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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~441~~ 172.

MARY E. H. GWIN AND MIERS F. TRUETT,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 10, 1900.

(17,926.)

a UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, nineteen hundred, pursuant to an appeal by Mary E. H. Gwin and Miers F. Truett, intervenors, appellants, and The United States of America, *is* respondent, in an appeal from the district court of the United States for the northern district of California in a proceeding entitled The United States of America against Vicente Peralta and others, to show cause, if any there be, why the order and judgment in the said cause entered July 30th, 1900, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 7th day of September, in the year nineteen hundred.

JOHN J. DE HAVEN, *Judge.*

b [Endorsed:] W. Land case No. 100. In the district court of the United States for the northern district of California. United States of America *vs.* Vicente Peralta and others. M. E. H. Gwin & M. F. Truett, intervenors. Citation. Service of the within citation admitted this 7th day of September, 1900. Frank L. Coombs, United States attorney for California, northern district. Filed Sep. 7, 1900. G. E. Morse, clerk.

1 In the District Court of the United States for the Northern District of California.

THE UNITED STATES
vs.
VICENTE PERALTA and Others. } No. 100. Land Cases.

To the hon. the district court of the United States for the northern district of California:

The petition of Mary E. H. Gwin and Miers F. Truett, intervening in this proceeding for their respective interests therein, by leave of the court first had and obtained, respectfully shows:

That heretofore, to wit, on or about the second day of February, in the year 1848, the United States of America entered into a contract in writing with the Mexican Republic for the sale by the latter and purchase by the United States of the Territory of Mexico lying north of a line commencing in the gulf of Mexico three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of

2 New Mexico; thence westwardly along the whole southern boundary of New Mexico, which runs north of the town called Paso to its western termination; thence northward along the western line of New Mexico until it intersects the first branch of the River Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch and thence in a direct line to the same); thence down the middle of said branch and of the said river until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific ocean.

Upon the express condition that in the said Territory Mexicans not electing to remain such shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution, and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property.

For which property so purchased the United States undertook to pay to the Mexican Republic the sum of fifteen million dollars ($15,000,000).

Which contract was incorporated in a writing known as the treaty of Guadalupe Hidalgo, which was duly executed by
3 the representatives of the contracting parties, and was proclaimed and made public on the 4th day of July, in the said year 1848, by the President of the United States, "to the end that the same and every clause and article thereof might be observed and fulfilled by the United States and the citizens thereof."

That after the said purchase was made a conference was held in the city of Queretaro between the Hon. N. Clifford and Hon. A. H. Sevier, representing the United States, and His Excellency Don Luis de la Rosa, minister of foreign affairs of the Republic of Mexico, thereunto duly authorized by their respective governments, touching certain proposed articles in the treaty of Guadalupe Hidalgo suppressed by the American Government, at which it was mutually agreed:

1. That by suppressing article IX and substituting article III of the treaty of Louisiana it was not intended to diminish in any way what was agreed upon by the aforesaid — IX in favor of the inhabitants of the territories ceded by Mexico.

2. That by suppressing article X it was not intended in any way to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article, preserve the legal values which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.

4 That, conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the second of March, 1836.

That by force of the said act of cession the United States became

vested with the naked legal title to and right of sovereignty over the whole of said territory.

That thereafter, and on the 3rd day of March, 1851, the United States, in part execution of such agreement on its part, entered into a contract in writing with the grantees of Spain and Mexico, claiming lands in the State of California (situated within the said purchase) by virtue of any right or title derived from the Spanish or Mexican government, requiring that each and every such person should present the same, with the evidence in support thereof, for examination to a board of commissioners provided for in an act of Congress of the United States approved on the said 3rd day of March, in the year 1851, within two years after the date of the act.

That it was thereby provided that it should be the duty of the said board to examine the claim so presented, and the evidence, and such evidence as should be produced on behalf of the United
5 States, and to decide upon the validity of the claim, with an appeal from such decision by either party to the district court of the United States for the district within which the land claimed is situated; which court was required to render judgment upon the pleadings and the evidence adduced and to be adduced, and grant an appeal therefrom, if required by either party, to the Supreme Court of the United States.

That it was further thereby provided that failure on the part of the claimant to so present his claim, or a final rejection of the same by the said board, or on a final decision of the said district or supreme court that the claim is invalid, the lands claimed should be deemed, held, and considered as part of the public domain of the United States.

That it was further hereby provided that for all claims finally confirmed by the said board or by the district or supreme court a patent should issue to the claimant upon his presenting to the General Land Office of the United States an authentic certificate of such confirmation and a plat of survey of the said land, duly certified and approved by the surveyor general of California, upon whom was thereby imposed the duty to cause all private claims which should be finally confirmed to be accurately surveyed, and to furnish plats of the same.

That it was thereby further provided that if the title of the
6 claimant to such lands should be contested by any other person, the contestant might present a petition to the judge of said district, setting forth his title thereto, who might, after a hearing, enjoin the issuance of a patent for a reasonable time, to enable the contestant to obtain a decision establishing the superiority of his title.

That it was further thereby provided that the final decree so to be rendered by the said board or the said district or supreme court should be conclusive between the United States and the said claimants.

That long prior to the execution of the said contract of sale between the United States and the Mexican Republic, and about the year 1820, the Spanish and Mexican authorities of Alta California

granted unto Luis Peralta the rancho of San Antonio within the limits of the present State of California.

And the proper authorities of Mexico thereupon delivered to the said Luis Peralta the seizin and possession of the said rancho.

And by its decree and judgment of juridical possession thereupon duly given and made the proper authorities of Mexico invested the said Luis Peralta with the seizin and possession of the lands

7 of said rancho by the following boundaries:

Commencing on the bay of San Francisco at a point where there are close to the bay the two cerritos of San Antonio, thence eastwardly along the northern base of said cerritos to the comb or crest of the coast range of mountain, or the sierra, which line constitutes its northern boundary, thence for its eastern boundary a line running along the comb or crest of the said sierra until it reaches the eastern extremity of a line beginning on the bay at the mouth of San Leandro creek and running up said creek, which is the southern boundary, and by the bay of San Francisco from the mouth of San Leandro creek to the beginning of the northern boundary line, which line along the bay constitutes its western boundary.

That at the time when the said contract of sale by the Mexican Republic to the United States was entered into the said Luis Peralta was the owner in fee and in possession of the whole of the said rancho under such grant by the boundaries specified in said act of juridical possession.

That by operation of the treaty aforesaid the said Luis Peralta became and was a citizen of the United States before the admission of the State of California into the Union.

That on or about the ninth day of September, in the year

8 1850, the State of California was admitted into the Union on an equal footing with the original States in all respects whatever.

That by operation of the constitution of the State of California the said Luis Peralta became and was a citizen of said State upon its admission into the Union.

That on or about the — day of ——, in the year 1851, the said Luis Peralta died seised and possessed of the said rancho of San Antonio, leaving him surviving his four sons, Domingo, Vicente, Antonio Maria, and Ignacio, and leaving a will, whereby he devised to them the whole of the said rancho of San Antonio.

That thereafter, to wit, on the 21st day of January, in the year 1852, the said Antonio Peralta, Vicente Peralta, Ignacio Peralta, and Domingo Peralta, claiming lands in California by virtue of a right and title derived from the Spanish and Mexican governments, to wit, under and by virtue of the said grant to their father, Luis Peralta, presented to and filed with the board of United States land commissioners constituted under the said act of Congress of March 3rd, 1851, and in pursuance of the requirements of the said act, their claim, in writing, for the lands of the rancho of San Antonio, in said State, alleging such grant by the boundaries aforesaid as the source of their title, together with such documentary evidence and

9 testimony of witnesses as the petitioners relied upon in support of their said claim, and thereby accepted the terms and

conditions of the said last-mentioned agreement of March 3rd, 1851, of the United States with their deceased father.

Which said petition is in the words and figures following, to wit:

To the hon. the board of commissioners for settling private land claims in California:

The petition of Vicente, Antonio, Ignacio, and Domingo Peralta, residents of the county of Contra Costa, State of California, respectfully submit to your hon. board the accompanying title to the rancho of land called San Antonio, granted to Luis Peralta (through whom your petitioners claim by will) on the 16th August, 1820, by Don Pablo Vicente de Sola, lieut. col. of the royal armies and political and military gov. of California, whose authority to grant lands was derived from the King of Spain by a royal cedula of 24 October, 1781, approving the regulations and instructions for the government of the Californias, drawn by Don Felipe de Neve, dated June 1, 1779. The quantity of land contained in said rancho is not known, it being granted by natural bounds, as follows, to wit: On the north by Don Castro's rancho or a little mountain called San Antonio, on the east by the mountain range, on the west by the coast, and on the south by the creek called San Leandro. No conflicting claim to
10 said rancho is known to your petitioners.

Further, your petitioners represent that they, as well as their father before them, have had long possession of said land, which they are ready to prove by living witnesses.

Your petitioners further represent that the said will under which they claim is of record in the county of Santa Clara, a copy of which they pray to be made part of this petition as soon as it can be obtained, so also the accompanying abstract of title and note of argument.

All which is respectfully submitted.

IRVING & ROSE.

Endorsed: No. 4. Petition of Vicente Peralta *et al.*, rancho of San Antonio. Filed Jan'y 21, 1852. J. P. Carr, sec'y. Recorded in Journal A, at pages 38 and 39.

Which petition and claim became the petition and claim in case No. 4 upon the docket of said board of land commissioners.

That the law firm of Irving & Rose was composed of Joseph K. Irving & J. K. Rose.

11 That thereafter and on the second day of August, in the year 1852, the said board made an order in said case No. 4 in the words and figures following, to wit:

On motion of the counsel of Ignacio Peralta and Antonio Peralta, ordered that their names be stricken out from the petition No. 4, and their claim rest on the several petitions Nos. 273 and 274 on the docket of this board for portions of the Rancho San Antonio, and that this be done without prejudice, and that the testimony hereto-

fore taken in No. 4 shall, so far as applicable, apply to all the said petitions.

That no claim in said case No. 4, other than the one above set forth, was presented to said board.

12 That thereafter the said board, when the said case number 4 was ready for hearing, proceeded to and did examine the claim made in said petition upon such evidence and the evidence produced in behalf of the United States, and did decide upon the validity of the claim, and did certify its decision with the reasons on which it was founded, and did also cause to be prepared two certified transcripts of their proceedings and decision and of the papers and evidence on which the same were founded, including the said petition in said case No. 4, and did, in due time, file one of such transcripts with the clerk of the district court of the United States for the northern district of California, in which court it was filed on the 23rd day of September, in the year 1854, and did transmit the other of said transcripts to the Attorney General of the United States.

That afterwards and after due proceedings had in said district court said court, in its land case No. 100, did duly review the said decision of said commissioners, and did affirm the validity of the claim of said petitioners as set forth in said petition, and did render judgment upon the pleadings and evidence in the case, affirming the validity of said grant by its decree, which decree as to such affirmance was duly given and made on the 26th day of January, in the year 1855.

13 Which decree is in the words and figures following, to wit:

Title of Court and Cause.

This cause *coming* on this day to be heard upon the petition and answer, the certified transcript of the proceedings and decision of the board of commissioners on private land claims in California, and of the papers and evidence on which the same are founded, and upon the further evidence taken by the order of this court, and was argued by counsel.

In consideration whereof this court doth order, adjudge, and decree—

That the claim presented in the petition filed in this case for the place called San Antonio is valid to the whole extent of its bounds, to wit, having for its northern boundary a line commencing on the bay of San Francisco at a point where there are close to the said bay the two cerritos, as described in the first possession given by Martinez to Louis Peralta on the 16th of August, 1820, running from the said bay eastwardly along by the southern base of the cerritos of San Antonio up a ravine, at the head of which there is a large rock or monument looking to the north, described in evidence as the Sugar-loaf rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the sierra; thence for the western boundary a line running along the comb of the said sierra until it reaches the eastern extremity of a line beginning on

14 the said bay of San Francisco at the mouth of the deep creek of San Leandro, and running eastwardly up the said creek to

its head or source in the sierra and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio, and by the said bay of San Francisco from the mouth of the said deep creek of San Leandro up to the beginning of the said line which has been described as the northern boundary of said tract, which line along the bay constitutes its western boundary.

And it is hereby further adjudged, ordered, and decreed that there be confirmed to the said Domingo and Vicente Peralta the northern portion of said land of San Antonio, bounded as follows: On the north by the northern boundary of said tract of San Antonio, as above described, on the east by the comb of the said sierra, on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio.

(Signed) ISAAC S. K. OGIER,
U. S. District Judge for the Southern Dist. of Cal., Sitting in the Northern Dist. pro Tem.

15 That thereafterwards and upon the motion of the attorney for the United States the said district court granted to the United States an appeal from the said decree to the Supreme Court.

That thereafterwards and in due time the attorney general of the United States gave and filed in the said district court a notice that such appeal would be prosecuted by the United States upon the sole question whether the said grant should be affirmed in its entirety.

16 That thereafterwards and at its December term, in the year 1856, the Supreme Court of the United States, after hearing and due deliberation, gave and rendered its decision affirming the validity of the said grant to said Don Luis Peralta in its entirety, by the boundaries and description of the said rancho therein contained and expressed, except as to its northern boundary, which was adjudged to run along the northern instead of the southern base of the cerritos of San Antonio, and did remand the case to the said district court for further proceedings in conformity with the opinion and decision of the Supreme Court.

17 Your petitioners further show that thereafter and on the 30th day of November, in the year 1859 (filed December 1, 1859), the said district court duly made and rendered its order and decree amending its said decree of January 26, 1855, so as to make it conform to the opinion and decision of the Supreme Court, and to correct a clerical error therein made by said district court.

Which said last-mentioned order and decree is in the words and figures following, to wit:

Title of Court and Cause.

It satisfactorily appearing to the court that in the decree of this court, heretofore entered in this cause and affirmed on appeal by the Supreme Court of the United States, a clerical error has intervened, and that the said decree is repugnant and inconsistent with itself, and it further appearing to this court that the northern boundary of the tract of land confirmed to said claimants is erroneously described as running by the southern base of the cerrito therein mentioned, whereas the said northern boundary, as declared and adopted by the Supreme Court of the United States in the opinion of said court in this case, is "the rivulet which issues from the mountain range, and runs along the foot of said cerrito of San Antonio, and at the entrance of a little gulch there is a rock elevating itself in the form of a monument and looking towards the

18 north," and it appearing to this court that the rivulet so adopted as the said northern boundary runs along the northern base of the said cerritos of San Antonio, and not along the southern base thereof; and it further appearing that the ridge of mountains constituting the eastern boundary of said rancho is erroneously denominated its western boundary, as is manifest from the face and terms of the decree itself:

It is, on motion of the counsel for the parties interested in said claim, and the district attorney being present and not objecting thereto:

Ordered that the said decree —, and the same hereby is, construed and amended by substituting the word "northern" for "southern" where the word southern the first time occurs in said decree, and the word "eastern" for "western" where the latter word first occurs in said decree.

(Signed) OGDEN HOFFMAN,
U. S. Dist. Judge.

(Endorsed:) Filed December 1, 1859. W. H. Chevers, clerk.

Your petitioners further show that, as they are advised and believe, the said decree so amended became and was the final decree in said case within the meaning of the said contract and act of Congress of March 3rd, 1851.

That such decree was duly given and made, and is of force, never having been appealed from, reversed, modified, annulled, or set aside.

19 Your petitioners further show that no grant of said Rancho San Antonio or of any part thereof was made by the Spanish or Mexican government of California to Domingo Peralta or Vicente Peralta, or to them jointly or in common.

That no claim under any such grant was ever presented to the said board or to the said district court, nor was proof of any such grant or claim made before the said board or court.

That no survey of the said grant or of the claim made to said board in said case No. 4 was ever made until a survey was made by the surveyor general of the United States for California and ap-

proved plat thereof furnished to the confirmees in the year 1895, as hereinafter stated and as required by the terms and provisions of the said contract and act of Congress of March 3rd, 1851.

Your petitioners further show that afterwards and on the 23rd day of July, in the year 1866, the Congress of the United States passed an act entitled An act to quiet land titles in the State of California.

That by the 8th section of said act it was provided that in the event that no survey of the said confirmed grant had been,
20 before the passage of said act, requested by said confirmees, nor had any such survey been requested within ten months after its passage, it was thereby made the duty of the surveyor general of the United States for California, as soon as practicable thereafter, to cause the lines of the public surveys to be extended over such land, and to set off in full satisfaction of the grant the quantity of land confirmed in the said final decree and as nearly as could be done in conformity with such decree.

Your petitioners further show that no survey of the grant of the San Antonio rancho confirmed in this proceeding had been requested by the confirmees or their assigns before the passage of said act, nor had any survey thereof been requested by them within ten months after the passage of said act, nor had any such survey been made, and it thereby became the duty of the surveyor general of the United States for California, as soon as practicable from the expiration of ten months from the passage of said act, to set off in full satisfaction of such grant and according to the lines of the public surveys the quantity of land confirmed in the final decree herein as nearly as could be done in accordance with such final decree.

That afterwards and on or about the 25th day of November, in the year 1895, and as soon as practicable after the passage of the said act of July 23rd, 1866, the said surveyor general duly made, approved, and certified a plat of the survey of the said rancho
21 of San Antonio in accordance with and in part execution of the said final decree of this court, and furnished the same to your petitioners as required by law.

Your petitioners here further show that they are interested in the lands of the said rancho under the said claimants and confirmees, and that their respective title thereto was derived by mesne conveyances from the said confirmees.

22 Your petitioners further show that on the second day of August, in the year 1853, Vicente Peralta, one of said confirmees, and his wife granted to Richard P. Hammond, John C. Hays, John Caperton, and Lucien Hermann, for a valuable consideration, all that portion of the said rancho lying south of a line running from a ravine or gully in the range of mountains of the Contra Costa south sixty-three degrees west magnetic to the shore of the bay of San Francisco, said line following the same direction to the center of Yerba Buena island or Goat island, and being the dividing line between the lands of Domingo Peralta and said Vicente Peralta, on the northeast the said ridge of mountains of Contra Costa to a gulch or ravine called de la Indita, on the southeast by said ravine

to the estuary of San Antonio, on the south and southwest the bay of San Francisco.

With certain exceptions and reservations, which do not affect the lands and premises here in question.

Which conveyance was in writing and recorded in Liber A of Deeds, page 202, in the recorder's office of the county of Alameda.

And that afterwards and on the 10th day of November, in the year 1855, the said Richard P. Hammond conveyed to your petitioner Mary E. H. Gwin, for a valuable consideration, twenty-five undivided one thousand and one parts of the same tract of land.

23 Which conveyance was in writing, and was recorded in said recorder's office, in Liber E of Deeds, at page 44.

Your petitioners further show that on the third day of November, in the year 1855, the said Richard P. Hammond conveyed to Henry B. Truett, for a valuable consideration, (twenty-five thousand) 25,000 (two hundred thousand and two hundred) 200,200 parts of the same tract of land.

Which conveyance was in writing, and was recorded in said recorder's office, in Liber D of Deeds, at page 753.

That the said Henry B. Truett died seised of the said lands intestate in the year ——, leaving his wife, Harriet Truett, and his only child, your petitioner, the said Miers F. Truett, his only heirs-at-law, and thereafter and in the year 1878 the probate court in and for Alameda county, after due proceedings had, by its decree duly given and made, duly distributed all the property whereof the said Henry B. Truett died seised or possessed to the said Harriet Truett and your said petitioner, Miers F. Truett, in equal shares.

Your petitioners further show that thereafter the said plat of survey was, on or about the second day of September, in the year 1896, presented to the honorable the Commissioner of the General Land Office of the United States, at the city of Washington, District of Columbia, together with duly certified copies of said final

23½ decree and an authentic certificate of such confirmation by your petitioner Mary E. H. Gwin and one Francisco Sanjurjo, since deceased, together with a deraignment of their respective titles thereunder from the said claimants, confirmees, Vicente, Domingo, Antonio, and Ignacio Peralta, with a request that he issue, or cause to be issued, to said claimants, confirmees, Vicente Peralta and others, a patent for the lands of the rancho, in accordance with such plat of survey, in due form of law.

Your petitioners further show that the said commissioner, whose duty it was to prepare and cause to be properly signed and issued, upon receipt of such plat of survey and certificate of confirmation, a patent to the said claimants, confirmees, for the said lands, although often requested, has neglected and refused, and still does neglect and refuse, and did on the 22nd day of September, in the year 1896, expressly refuse to prepare and issue, or cause to be issued, such patent, to the great damage of petitioners.

24 Your petitioners further show that the said Commissioner set forth in writing by the hand of the Hon. E. F. Best, As-

sistant Commissioner, his reasons for such refusal, as is shown in Exhibit "A" attached to and made a part of this petition.

Your petitioners further show that upon reconsideration the said Commissioner set forth in writing by the hand of the Hon. F. W. Mondell, Assistant Commissioner, his further reason for such refusal, as is shown in Exhibit "B" attached to and made a part of this petition.

And thereafter the Secretary of the Interior, having been duly requested by your petitioner- to cause to be prepared and issued such patent for the said lands, did refuse so to do, assigning as his reasons for such refusal the matters so assigned by the said Assistant Commissioner, F. W. Mondell.

Your petitioners further show that the act of the said surveyor in making and certifying the said plat of survey of November 26, 1895, was the act and deed of the said The United States; that the same was made in conformity with the requirements of said contract and act of Congress of March 3d, 1851, and said act of July 3d, 1866; that the said plat was accepted by your petitioners on behalf
25 of the said claimants, confirmees; that the same has never been appealed from, reversed, or set aside.

And your petitioners pray leave to refer to the said plat of survey now on file and of record in the proper land office and in the Department of the Interior of the United States, or to a certified copy thereof, and to make the same a part of this their petition.

Your petitioners further show that on or about the said second day of September, in the year 1896, at the city of Washington, District of Columbia, there was duly served upon the Hon. S. W. Lamoureux, Commissioner of the General Land Office of the United States, copies of the said several decrees of this court of January 26th, 1855, and of November 30th, 1859 (filed December 1, 1859), duly certified by the clerk of this court under his hand and the seal of said court.

And that at the same time there was duly presented to the said Commissioner a plat of the survey of the said Rancho San Antonio duly certified and approved by the surveyor general of California, to wit, the said plat of survey so certified and approved by the said surveyor in the year 1895, with a request that he prepare or cause to be prepared and issued to the confirmees a patent for the lands of said rancho in accordance with said decree and plat of survey, which was refused.

26 Petitioners further show that, as they are advised and believe, the claimants conformed to all the requirements of the said contract and performed all the conditions imposed upon them by the said act of Congress of March 3d, 1851.

But that the United States has neglected and refused to abide by and perform the said contract on her part or to execute the said judgment against her in favor of said claimants and your petitioners, although often requested so to do.

Your petitioners further show that it is sometimes given out and pretended by the United States and by the Commissioner of the General Land Office of the United States that the said district court,

by its order or decree made and entered on the 30th day of August, in the year 1859, did order and direct the surveyor general of the United States for California to bring into court a plat of survey of the said rancho of San Antonio, and that the said surveyor general did, in obedience to said order and decree, return into court a plat of such survey.

That thereafter, and after the entry of said decree of November 30, 1859 (filed December 1, 1859), the said court did cause such plat of survey of said rancho to be returned to said surveyor general, with instructions to conform his said survey to the said last-mentioned decree.

That thereafter, and on or about the 10th day of August,
27 1860, the said surveyor did return into court a corrected plat of the survey of the said rancho.

That thereafter the said district court did, by its order and decree made and entered June 5, 1871, modify the plat of survey of said rancho.

That the said surveyor did thereupon modify the said plat of survey of said rancho.

That the said court did thereafter, and on the 4th day of August, in the year 1871, make its order approving such modified survey of said rancho.

That the said court did thereafter allow an appeal therefrom to the circuit court of the United States for the ninth judicial circuit.

That the said circuit court did thereafter make an order affirming said decree and remanding the case to the said district court.

And do further give out and pretend that thereafter the Commissioner of the General Land Office of the United States did issue to the said Domingo and Vicente Peralta a patent of the United States for the lands contained in said modified survey, and that such
28 patent was in full execution and performance of the said decrees of January 26, 1855, and of the 30th day of November, 1859 (filed December 1, 1859).

All of which pretences are, as your petitioners are advised and believe, wholly unfounded in fact and in the law and insufficient to defeat the right of your petitioners to the final execution of said last-mentioned decrees.

Your petitioners further show that the said district court did, on or about the 30th day of August, in the year 1859, make its certain order and decree in this case (land case No. 100) in the words and figures following, to wit:

Title of Court and Cause.

"On application of Tully R. Wise, Esq., acting U. S. attorney, it is ordered that the surveyor general of the United States for the State of California return to this court the plat of the survey approved by him of part of the rancho of San Antonio, No. 1, land commission."

Endorsed: Filed Aug. 30th, 1859. W. H. Chevers, clerk.

Your petitioners further show that prior to the making of such order the said surveyor general had appointed J. T. Stratton his deputy for the purpose of surveying the northern portion of said grant, and had, on or about the 8th day of February, in the year 1858, issued to him his letter of appointment and instructions respecting the survey in the words and figures following, to wit:

29

U. S. SUR. GEN. OFFICE,
SAN FRANCISCO, CALIFORNIA, *Feb'y 8th*, 1858.

SIR: Whereas in the claim of Domingo & Vicente Peralta to the northern portion of the lands of San Antonio, hereinafter described, the Supreme Court of the United States has affirmed the decree of the dist. court for the northern district of California confirming said lands to said claimant, I have thought proper to appoint you my deputy in this special case for the execution of the final survey thereof.

The U. S. dist. court has confirmed the entire rancho of San Antonio to the following effect: "The court doth order, adjudge, and decree that the claim presented in the petition filed in this case for the place called San Antonio is valid to the whole extent of its bounds, to wit, having for its northern boundary a line commencing on the bay of San Francisco at a point where there are close to the said bay the two cerritos as described in the first possession given by Martinez to Luis Peralta on the 16th of August, 1820, running from the said bay eastward along the southern base of the cerrito of San Antonio up a ravine, at the head of which there is a large rock or monument, looking to the north, described in evidence as the Sugar-loaf rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the sierra; thence, for the western boundary, a line running along the comb of the said

30 sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco at the mouth of the deep creek of San Leandro and running eastwardly up the said creek to its head or source in the sierra and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio, and by the said bay of San Francisco from the mouth of said deep creek of San Leandro up to the beginning of the said line which has been described as the northern boundary of said tract, which line along the bay constitutes the western boundary;" and the confirmation to Domingo and Vicente Peralta is as follows:

"And it is hereby further ordered, adjudged, and decreed that there be confirmed to the said Domingo and Vicente Peralta the northern portion of said land of San Antonio bounded as follows: On the north by the northern boundary of said tract of San Antonio as above described, on the east by the comb of the said sierra, on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings of the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio."

You will survey the above-mentioned claim of Domingo and Vicente Peralta to the northern portion of the rancho of San Antonio in accordance with the call of the decree of the court above set forth. For a more particular description of the manner
31 you are to proceed in the execution of said survey, I refer you to general instructions to deputy surveyors, dated January, 1858. In accordance with instructions received from the General Land Office you are forbidden to receive any compensation whatever in any way from the claimants of this rancho for surveying the exterior boundaries thereof.

Respectfully, J. W. MANDEVILLE,
U. S. Sur. Gen'l, Cal.

J. T. Stratton, Esq., dep. sur.

Endorsed: Filed May 1, 1861. W. H. Chevers, clerk.

That thereafter, and on or about the second day of November, in the year 1859, the said surveyor general did return into said court and deliver to the clerk thereof a plat of survey purporting to be a plat of the survey of all that portion of the said rancho of San Antonio which is particularly described as follows, viz:

The northern portion of said land of San Antonio, bounded as follows: On the north by the northern boundary of said tract of San Antonio as above described, on the east by the comb of the said sierra, on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends
32 from the said bay to the most eastern boundary of the rancho of San Antonio.

That the said plat of survey was certified by the surveyor general in the words and figures following, to wit:

Plan of the northern part of the rancho of San Antonio finally confirmed to Vicente and Domingo Peralta, surveyed, under the orders of the U. S. survey-r general, by J. T. Stratton, dep'y survey-r, February, 1858, containing 18,725.83 acres.

I certify that this is a full, true, and correct copy of the original on file in this office, the location of which has been approved by me.

U. S. surveyor general's office, San Francisco, Cala., October 21st, 1859.

J. W. MANDEVILLE,
U. S. Sur'r Gen'l, Cala.

That, as your petitioners are also informed and believe, the United States excepted to such survey, and filed exceptions thereto in the words and figures followiug, to wit:

Title of Court and Cause.

And now come the United States, by their acting attorney, Tully R. Wise, and except to the survey of the land claims in this case, made under final decree, the location of which was approved
33 by the U. S. surveyor general for California, and a certified copy of the plat whereof was filed in this court, pursuant to its order, on the 2d day of November, A. D. 1859.

And the United States aver:

1st. That the said survey is erroneous because the land embraced within its lines is of greater extent than that confirmed by said final decree.

2nd. That the said survey is erroneous because the said final decree directs the northern line to be run in a specific manner and from one certain natural object to another, whereas the northern line of said survey has been run so as to include a large quantity of land north of the line fixed by said final decree, disregarding the call of the said final decree for a certain rock called "Sugar-loaf rock," and substituting therefor another and a different rock not mentioned or called for in said final decree.

Wherefore the United States pray that the said approved survey be set aside as erroneous, and that the surveyor general of the United States for California be directed to cause a resurvey of the said land to be made in conformity with the true intent and meaning of said final decree.

San Francisco, Nov. 22, 1859.

TULLY R. WISE,
Acting U. S. Att'y.

Endorsed: Service of a copy of the within exceptions is hereby admitted. Nov. 23d, '59. H. P. Irving. Filed Nov. 23, 1859. W. H. Chevers, clerk.

That thereafter, and on the 3d day of December, in the
34 year 1859, the said district court made an order in said case in the words and figures following, to wit:

Title of Court and Cause.

It appearing to the court that a final survey in the above-entitled cause has been returned to this court, and that since such survey was made the decree in this case has been corrected of certain clerical errors, as is particularly shown in the order for that purpose, entered December 1, 1859, it is ordered that the said survey be returned to the surveyor general in order that he may make the same to conform to the decree herein as amended by the said order of December first, saving to the United States and other parties entitled to be heard the right hereafter to except to the said order of December 1, 1859, and to the survey which may be made under it.

OGDEN HOFFMAN,
Dist. Judge.

Endorsed: Filed Dec. 3, 1859. W. H. Chevers, clerk.

That afterward, and on or about the tenth day of August, in the year 1860, the said surveyor general returned into court a plat of survey purporting to be a corrected plat of such survey of the said portion of said rancho, containing 19,143.86 acres.

Your petitioners further show that thereafter, and on or about the eighth day of October, in the year 1860, Horace W. Carpentier,
35 one of the attorneys of this court, filed in this court in this case his affidavit of intervention in the words and figures following, to wit:

Intervention of H. W. Carpentier & Others.

Title of Court and Cause.

Horace W. Carpentier, being duly sworn, says that by an act of the legislature passed May 4, 1852, entitled "An act to incorporate the town of Oakland and to provide for the construction of wharves thereat," the lands lying within the limits of said town as therein described between high tide and ship channel were granted by the State, which was then the owner thereof, to said town; that afterwards, by various mesne conveyances from said town, this affiant and H. N. Carpentier and J. E. Smith became and still are the owners of said lands; that amongst the land so granted by the State and now owned by the said persons, as aforesaid, are so much of the lands lying under the waters of that arm of the bay of San Francisco known as the estuary of San Antonio and on the shores of said estuary of San Antonio up to the highest tide line as are situated on the northerly side of the middle line of said estuary; that the said lands are included in the final survey as approved and returned to this court as parcel of the lands confirmed to the claimants in this case, and that, as this affiant is advised, the said lands never were included within the grant herein confirmed nor the decree of confirmation in this case.

That this affiant and the said Domingo Peralta and Cipri-
36 ano Thurn are the owners, under the grant confirmed in this case, of all the northern part of the tract herein confirmed, lying adjacent to the northern boundary thereof, according to the said approved survey.

That this affiant is the attorney of all the other persons hereinbefore named, and that they and this affiant are interested in the question of said survey.

Wherefore he asks that they may be allowed to intervene for the protection of their rights.

(Signed) H. W. CARPENTIER.

Sworn to and subscribed before me this 8th October, 1860.

W. H. CHEVERS,
U. S. Com.

Endorsed: Filed October 8, 1860. W. H. Chevers, clerk.

That thereafter the said Horace W. Carpentier, H. N. Carpentier, and J. E. Smith filed in this court their exceptions and objections

to the said survey, and the United States came and also filed its objections thereto.

Whereupon, and on or about the 22nd day of November, in the year 1862, the said district court made an order in this case modifying the said survey and plat of survey in the words and figures following, to wit:

37 Title of Court and Cause.

This cause came on to be heard on objections to the official survey and location of the land confirmed to Vicente Peralta and Domingo Peralta, which survey was made by James T. Stratton, U. S. dep. surveyor, and, with the plat thereof, approved March 3, 1860, by J. W. Mandeville, U. S. surveyor general for California, and a certified copy — plat filed herein; and the allegations and proofs having been seen, and counsel for the respective parties heard, and due deliberation had in the premises—

It is now ordered, adjudged, and decreed that all of said objections be, and the same hereby are, overruled and dismissed, and that the said official survey is a just and true location of the lands heretofore confirmed to the claimants herein, and that the same be, and hereby is, approved and confirmed; except as to the objections of the intervenors, Carpentier and others, to the including within said survey of the tide lands lying within the corporate limits of the city of Oakland; which said objections are hereby sustained, and so much of said official survey as lies within said corporate limits is hereby adjudged to be erroneous and ordered to be corrected and modified.

And it is further ordered that the surveyor general of the U. S. for California cause said survey and location to be corrected and reformed so as to conform to this decree, and return the same to this court for its final confirmation and approval.

38 And it is further ordered and adjudged that in correcting and reforming said survey and location hereunder the said surveyor general shall, and he is hereby directed to, follow and adopt as definitely established the official survey already made, without change or modification, from the initial point thereof, designated on said plat "Initial point, stake in mound, A. C. CCC," through all the lines and courses thereof, respectively numbered on said plat from 1 to 93, both inclusive, and also respectively numbered from 113 to 130, inclusive, and that between lines or courses 93 to 113, inclusive, said official survey and location be so changed, corrected, and modified as to run along the inner line of the shore, excluding therefrom and from the lands confirmed the waters of the bay of San Francisco and of the arms thereof and the lands covered thereby as far as the tides ordinarily flow at the full change of the moon.

And it is further ordered that a certified copy of this order be served on the U. S. surveyor general by the U. S. marshal.

OGDEN HOFFMAN,
U. S. Dist. Judge.

Endorsed: Filed Nov. 22d, 1862. W. H. Chevers, clerk.

Petitioners further show that afterwards, and on or about the 26th day of November, in the year 1866, this court made its further order in this case, amending the said last-mentioned order, in the words and figures following, to wit:

39

Title of Court and Cause.

This cause coming on again to be heard on motion to amend the interlocutory decree entered herein on the 22nd day of November, 1862, so as to conform it to the decision of this court directing a decree, was argued by counsel, and thereupon and in consideration thereof it is ordered, adjudged, and decreed that the said interlocutory decree be, and the same is hereby, amended so as to read as follows: "This cause came on this day to be heard on objections to the official survey and location of the land confirmed to Vicente Peralta and Domingo Peralta, which said survey, a plat of which is on file herein, was made by James T. Stratton, U. S. dep. surveyor, and approved on the 3rd day of March, 1860, by J. W. Mandeville, U. S. surveyor general for the State of California, and was argued by counsel, and thereupon and in consideration thereof it is hereby ordered, adjudged, and decreed that the said official survey be modified between course 93 and course 113 so as to include all the land between said courses down to the ordinary high-water line, and exclude only so much land between said courses as is covered by the tides which happen between the full and change of the moon, twice in twenty-four hours; and it is further ordered, adjudged, and decreed that all other exceptions to the said survey be, and the same hereby are, overruled, and that the said survey in all other respects be, and the same hereby is, approved; and it is further ordered that the surveyor general of the United States for the State of California proceed without delay to cause said modifications to be made, and that he return into this court a certified plat of
40 the survey, so modified as aforesaid, for approval."

OGDEN HOFFMAN,
U. S. Dist. Judge.

Endorsed: Filed Nov. 27th, 1866. Geo. C. Gorham, clerk, by Dan'l T. Sullivan, deputy.

Petitioners further show that thereafter, and on or about the 9th day of March, in the year 1869, the said surveyor general returned into court and delivered to the clerk thereof a plat of survey purporting to be a modified plat of survey of said portion of said grant.

That afterward, and on or about the 8th day of March, in the year 1870, Edward R. Carpentier, one of the attorneys of said court, filed his affidavit in said court in this case in the words and figures following, to wit:

Title of Court and Cause.

DIST. OF CALIFORNIA, *ss* :

E. R. Carpentier, being duly sworn, says that the interest of H. W. Carpentier, intervenor herein, in the lands constituting the water front of a part of the premises in question herein and affected by the surveys before the court, has been conveyed and is now held by the Oakland Water Front Company, a corporation duly formed and existing under the laws of California, and that said corporation has an interest in the question of the said surveys.

41 Wherefore deponent prays that it be permitted to intervene for the protection of its said interests.

E. R. CARPENTIER.

Sworn — this 8th day of March, 1870, before me—

EDW'D B. COTTER,
U. S. Comm'r.

Endorsed: Filed March 8th, 1870. E. B. Cotter, clerk, by A. D. Grimwood, D. C.

That thereafter, and on or about the 29th day of March, in the year 1871, the said district court made its certain order in this case in the words and figures following, to wit:

Title of Court and Cause.

It appearing from the verified petition for intervention, now on file in this case, and by the entries in the register of land cases, that Horace W. Carpentier, H. N. Carpentier, James E. Smith, Cipriano Thurn, and Domingo Peralta intervened in this cause in the matter of the survey and location of the lands herein confirmed on the 8 day of October, 1860, and that they have ever since appeared, in person and by counsel, as intervenors in this case, and it further appearing that the order allowing said intervenors to intervene cannot now be found, it is ordered that leave be now given the said persons above named to intervene herein, and that this order be now

42 filed *nunc pro tunc* as of the said date of October 8, 1860.

OGDEN HOFFMAN,
Dist. Judge.

Endorsed: Filed March 29th, 1871, *nunc pro tunc*, as of October 8th, 1860. Edw'd B. Cotter, clerk, by A. D. Grimwood, D. C.

And also its certain other order in the words and figures following, to wit:

Title of Court and Cause.

It appearing from the verified petition of intervention in this case and from the entries in the register of land cases that the Oakland Water Front Company, a corporation created and existing under the laws of California, intervened in this case in the matter of the survey and

location of the lands herein confirmed on the 8th day of March, 1870, and that the said company has ever since appeared, by counsel, as intervenor in this case, and it further appearing that the order allowing said intervenor to intervene cannot now be found, it is ordered that leave be now given to the said Oakland Water Front Company to intervene herein, and that this order be now filed, *nunc pro tunc*, as of the said 8th day of March, 1870.

March 29, 1871.

OGDEN HOFFMAN,
Dist. Judge.

Endorsed: Filed March 29th, 1871, *nunc pro tunc*, as of March 8th, 1870. Edw'd B. Cotter, clerk, by A. D. Grimwood, D. C.

43 Petitioners further show that thereafter and on or about the 5th day of June, in the year 1871, the said court made its certain order in this case further modifying the said last-mentioned survey and plat of survey in the words and figures following, to wit:

Title of Court and Cause.

In the Matter of the Survey and Location of the RANCHO SAN ANTONIO.

This cause came on this day again to be heard upon objections to the modified survey filed in this cause and was argued by counsel; and thereupon and in consideration thereof it is ordered, adjudged, and decreed that said modified survey be, and the same is hereby, set aside as not being in conformity to the decree and directions of this court heretofore entered and given in this cause; and it is further ordered, adjudged, and decreed that the said survey hereby set aside be modified between course ninety-three (93) and course one hundred and thirteen (113), as the same are laid down on the plat, heretofore filed in this cause, of the survey of said lands made by James T. Stratton, United States deputy surveyor, and approved by J. W. Mandeville, United States surveyor general for the State of California, on the 3rd day of March, 1860, so as to include all the lands between said courses down to the ordinary high-water line and exclude only so much land between said courses as is covered

44 by the tides which happen between the full and change of the moon, twice in twenty-four hours.

And it is further ordered, adjudged, and decreed that the surveyor general of the United States for the State of California cause said survey hereby set aside to be modified without delay in accordance with this decree, and return a plat of the same into this court for its approval; and in determining the line of ordinary high water between the courses aforesaid, it is further ordered, adjudged, and decreed that the said surveyor general adopt the line fixed as such by the officers of the United States Coast Survey as the same is delineated on the plat marked Exhibit Rogers No. 1 and described

in the field-notes of said survey, copies of which are on file in this cause.

OGDEN HOFFMAN,
Dist. Judge.

Endorsed: Filed June 5th, 1871. Edw'd B. Cotter, clerk, by A. D. Grimwood, D. C.

Your petitioners further show that thereafter, and on or about the 26th day of July, in the year 1871, the said surveyor general filed in this court and delivered to the clerk thereof a plat of survey purporting to be a modified survey of said portion of said rancho.

Petitioners further show that thereafter, and on or about the 4th day of August, 1871, this court made its certain order in this case in the words and figures following, to wit:

45 Title of Court and Cause.

In the Matter of the Survey & Location of that Portion of the RANCHO SAN ANTONIO Confirmed in the Above-entitled Cause.

This cause came on this day again to be heard, and it appearing to the court that no exception has been filed to the modified survey heretofore made under the order of this court, and a plat of which was filed in the clerk's office of this court on the 26th day of July, 1871:

Now, therefore, on motion of Williams & Thornton, due notice thereof having been given, it is ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that said modified survey be, and is hereby, approved as a true and correct location of the lands confirmed in the above-entitled cause.

The survey of which confirmation is hereby made contains eighteen thousand eight hundred and forty-eight $\frac{98}{100}$ (18,848.98) acres, and is the same executed under the order and directions of this court by decree entered in this cause on the 5th day of June, 1871, a duly certified plat whereof was filed in the clerk's office of this court, as aforesaid, on the 26th day of July, 1871, and is marked "Approved August 4th, 1871. Ogden Hoffman, dist. judge," and attached hereto as a part of this decree.

OGDEN HOFFMAN,
U. S. Dist. Judge.

Endorsed: Filed August 4th, 1871. Edw'd B. Cotter, clerk, by A. D. Grimwood, D. C.

46 That there was attached to the said order the said modified plat of survey of the said northern portion of the said rancho of San Antonio.

Petitioners further show that afterward this court granted an appeal from the said last-mentioned order to the circuit court of the United States for the ninth judicial circuit.

That thereafter such proceedings were had in said circuit court on

such appeal that on or about the 31st day of July, in the year 1874, the said court made its order in the words and figures following, to wit:

At a stated term of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city of San Francisco, on Friday, the 31st day of July, in the year of our Lord one thousand eight hundred and seventy-four.

Present: The Honorable Stephen J. Field, associate justice of the Supreme Court of the United States.

THE UNITED STATES
v.
DOMINGO and VICENTE PERALTA. } No. 981. Decree.

On filing the stipulation of the parties consenting to the dismissal of the appeal herein taken by the United States and the intervenors, upon the terms and for the reasons in the said stipulation mentioned, and upon motion of Horace W. Carpentier, of counsel for the claimants and intervenors, and the United States district attorney being present and consenting thereto, and an order dismissing said appeal having been made and entered in the minutes, on consideration thereof it is ordered, adjudged, and decreed that the appeals to this court in said cause on behalf of the United States and of the intervenors be, and the same are hereby, dismissed. Let the stipulation be filed and made of record in this case.

47

(S'g'd) FIELD, J.

Endorsed: Filed and entered 31st July, 1874. S. S. B. Sawyer, clerk.

That a copy of the said order was certified by the clerk of said court as follows:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify the annexed to be a copy of the original decree in the cause therein entitled now on file and remaining of record in my office; that I have compared the same with said original, and that the same is a correct transcript therefrom and of the whole of said original.

48

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, this 3d day of August, A. D. 1874.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

Which certified copy of said order was returned to and filed in the said district court on the 4th day of August, in the year 1874.

Whereupon and on the said 4th day of August, 1874, the said district court made an order in said case in the words and figures following, to wit:

Title of Court and Cause.

On the production of a certified copy of the decree of the United States circuit court dismissing the appeals to the said circuit court heretofore taken in the case by the United States and the intervenors herein, and on motion of Henry P. Irving, Esq., of counsel for claimants:

It is ordered that the said copy of decree be filed in this court, and that the claimants have leave to proceed under the decree heretofore entered in this court confirming the survey in this case as under final decree.

OGDEN HOFFMAN,
Dist. Judge.

Endorsed: Filed August 4th, 1874. Edw'd B. Cotter, clerk,
49 by A. D. Grimwood, deputy clerk.

Your petitioners further show that, as they are informed and believe, the Commissioner of the General Land Office thereupon caused to be prepared and recorded a patent of the United States for that portion of the lands of the said rancho of San Antonio which was included in the said survey.

Your petitioners further show that, as they are informed and believe, neither the United States, the State of California, the said Horace W. Carpentier, H. N. Carpentier, J. E. Smith, nor the said The Oakland Water Front Company ever presented to the said board of land commissioners a claim for the lands or any portion thereof contained in the said grant to Luis Peralta of the said rancho of San Antonio.

Your petitioners further show that, as they are advised and believe, all of the said acts, doings, and pretences respecting the said last-mentioned surveys were and are contrary to equity and good conscience, are in violation of the rights of the confirmees and of your petitioners under the said agreement and act of Congress of March 3d, 1851, contrary to the stipulations and provisions thereof, and manifestly tend to the wrong and injury of your petitioners in the premises.

That, as your petitioners are also advised and believe, all
50 the acts, orders, judgments, and decrees so as aforesaid done, made, and entered in respect of said surveys were *coram non judice* and void.

Your petitioners further show upon and according to their information and belief that the quantity of land embraced in the said plat of survey of November 25, 1895, is forty-six thousand six hundred and eighty-five and forty one-hundredths acres.

That the United States has issued patents for portions only of said grant, as follows:

To Antonio Peralta for sixteen thousand and sixty-seven and seventy-six one-hundredths acres.

Ignacio Peralta for nine thousand four hundred and sixteen and sixty-six one-hundredths acres.

Domingo and Vicente Peralta for eighteen thousand eight hundred and forty-eight and ninety-eight one-hundredth acres; or, in all, forty-four thousand three hundred and thirty-three and forty one-hundredths acres.

Leaving unpatented lands of the said rancho aggregating 2,352 acres.

Your petitioners further show that, as they are advised and believe, the United States holds the naked legal title to said 2,352 acres of the lands of said rancho in trust for the grantees of said Luis Peralta, the said confirmees and their assigns, and your petitioners.

50½ Your petitioners further show that all the claimants, confirmees in this case, departed this life before the first day of January, in the year 1880, and that on the 19th day of July, in the year 1899, this court, after due proceedings had, did, by its order made and entered in open court on that day, the Hon. Frank L. Coombs, attorney for the United States, being present and not objecting, admit your petitioners to intervene in this case; which order is in the words and figures following, to wit:

Title of Court and Cause.

On motion of W. H. Fifield, Esq., it is ordered that M. F. Truett, John Caperton, and M. E. H. Gwin be, and each of them is hereby, authorized to intervene in this proceeding for the protection of their prospective (respective) interests, as such interests may be made to appear.

51 Wherefore your petitioners pray that the decree of this court, so made and entered in this proceeding on the 30th day of November, in the year 1859 (and filed December 1, 1859), may be ordered to be executed.

That the United States may, by the order and judgment of this court, be directed and required to cause to be made, signed, and issued to the said claimants, confirmees in the proceeding, its patent in due form of law for the lands of the rancho of San Antonio or for so much and such parts thereof as have not heretofore been patented to them or any of them, by a day to be fixed in such order and judgment, and that in default thereof the United States show cause before this court, at a time and place to be fixed in such order and judgment, why she has not so made, signed, and issued or caused to be made, signed, and issued such patent.

And that your petitioner- may have such further and other or other and further order and relief in the premises as may be just and agreeable to equity.

MARY E. H. GWIN,
MIERS F. TRUETT,
By their attorneys, BOYD & FIFIELD.

JAMES T. BOYD, *Of Counsel.*

52 "SCHEDULE A," Referred to in the within Petition.

(Copy.)

"G." G. McC. F. C.

W. H. L. GENERAL LAND OFFICE, WASHINGTON, D. C., *September* 22, 1896. W. O. C. J. V. W.

U. S. surveyor general, San Francisco, Cal.

SIR: There has been filed in this office by James T. Boyd, of San Francisco, a petition of Mary E. H. Gwin and Francisco Sanjurjo for the issue of a second patent for the San Antonio rancho, California. The parties named show that they are the owners respectively of an undivided interest in said rancho, and ask that a new patent be issued, including not only the lands already patented, but also the "land covered by the waters of San Antonio creek," which is not included in the patents heretofore issued.

This rancho was originally granted to Don Luis Peralta, and the claim therefor was presented to the board of land commissioners by his sons, Vicente, Antonio, Ignacio, and Domingo. Afterwards the attorneys for Antonio and Ignacio Peralta applied for leave to file separate petitions, each for his separate portion of said rancho, which was granted, and a stipulation was entered into by which Ignacio Peralta was given the southern portion of said claim; that, going north, the second tract was given to Antonio Peralta, Vicente and Domingo Peralta being given the northern portion.

52*a* The district court for the southern district of California confirmed this claim in its entirety, giving the western boundary as follows:

"From the mouth of said deep creek of San Leandro up to the beginning of the said line which has been described as the northern boundary of said tract, which line along the bay constitutes its western boundary."

The three claims were also confirmed by separate decrees, the boundary between the claim of Vicente and Domingo Peralta and that of Antonio Peralta being given as "a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine is a small house in sight of the public road."

The decree in the case of Vicente and Domingo Peralta was affirmed by the Supreme Court of the United States (19 Howard 343).

This ravine appears to be San Antonio creek, which is shown to end in San Antonio bay, an arm of the bay of San Francisco. Patent issued to Domingo and Vicente Peralta for the lands north of said ravine to bay of San Antonio, the survey running at the water line around said bay, and patent issued to Antonio Peralta for the lands south of said bay and ravine, the survey and patent following the water line of the bay of San Antonio.

The contention of the petitioners is to the effect that as the bay of San Francisco is the western boundary of said grant, as confirmed,

52b they are entitled to a patent for the lands covered by the waters of San Antonio bay, and request the issue of a second patent to the Peraltas for the whole of the grant, including the land under the waters of said bay.

A brief is filed on behalf of the petitioners, which it is unnecessary to consider, as the action taken by the courts upon the survey of these claims precludes this office from further action.

A survey was made of the claim of Antonio Peralta, which was approved by the district courts in the northern district of California October 4, 1871, and patent issued accordingly.

A survey of the claim of Vicente and Domingo Peralta, duly made, and approved by the surveyor general of California, was returned into said court, which court, under date of November 22, 1862, rendered a decree directing a modification of said survey between courses 93 and 113, inclusive, so as to exclude therefrom and from the lands confirmed the waters of the bay of San Francisco and of the arms thereof and the lands covered thereby as far as the tides ordinarily flow at the full and change of the moon. An amended decree was entered November 27, 1866, which, however, did not change in effect the portion above recited.

A survey under this decree was returned into court, and the court, on July 5, 1871, directed a modification of this survey to conform to the former decree. The survey was accordingly modified, again presented to the court, and by decree dated August 4, 1871, duly approved.

An appeal from this action of the district court was taken by certain intervenors to the circuit court for the district of Cali-
52c fornia, which was subsequently certified to the Supreme Court of the United States.

While the case was pending in the Supreme Court a compromise seems to have been effected, and the appeals to the circuit court were dismissed. This left the decree of the district court as final.

The question was again brought before this office upon a protest against the survey of said claim, and on January 23, 1877, a decision was rendered, holding that the district court having approved said survey in the proper exercise of its jurisdiction, nothing remained for this office but the ministerial duty of issuing a patent upon said survey.

This decision was affirmed by the Secretary of the Interior, February 7, 1877, who directed the Commissioner of the General Land Office to issue patent according to said survey.

It will thus be seen that the particular matter raised by the petitioners has long since become *res judicata*, and the petition is therefore dismissed.

Advise Mr. James T. Boyd, 324 Pine St., San Francisco, of this action.

Local counsel for the petitioners have been advised.

Very respectfully,

(Signed) E. F. BEST,
Assistant Commissioner.

52d "SCHEDULE B," Referred to in the within Petition.

(Copy.)

J. W. W. "G."

U. S. surveyor general, San Francisco, California.

SIR: In 1820 the Mexican government granted to Don Luis Peralta the Rancho San Antonio, a tract of land lying between the summit of the Coast Range mountains, on the east, and the bay of San Francisco, on the west, in what are now townships one and two south and one north.

On January 21, 1852, the title of Louis Peralta having in the meantime passed to his sons, Domingo, Vicente, Antonio, and Ignacio, they presented their petition for confirmation of said grant to the board of commissioners under the act of March 3, 1851, 9 Stats., 631, but before any action was taken thereon a stipulation was filed by which they divided said lands among themselves, each taking a part extending from the mountains to the coast, as follows: Domingo taking the tract furthest north, Vicente the next on the south, Antonio the next, and Ignacio the other.

After the lands were partitioned in this manner Antonio and Ignacio instituted separate proceedings for the confirmation of the parts allotted to them, but their names were not stricken from the original petition which prayed confirmation of the entire tract.

After the commissioners had sustained both of these peti-
52e tions they went on appeal to the United States district court, where decrees of confirmation were entered in each case.

In the decree rendered on the original petition there were two paragraphs, one confirming the entire grant in general terms and the other specially confirming the grant as to lands allotted to Domingo and Vicente. This case then went on appeal to the Supreme Court of the United States, where the grant was again declared valid and effective; but, inasmuch as the question now before me for consideration was not then involved or considered, it is not necessary to take notice of that decision further than to say that by its mandate the case was sent back to the district court, that "such further proceedings be had as according to right and justice and the laws of the United States ought to be had."

It now becomes pertinent to notice particularly the western boundary line of the entire rancho, and also to call attention to the line dividing the lands of Vicente from those of Antonio.

The first paragraph of the decree, confirming the entire grant, describes the western boundary as follows: "By the said bay of San Francisco (from the southwest corner of the entire tract) * * * up to the beginning (the northwest corner), which line along the bay constitutes the boundary," while the second paragraph, confirming the grant as to the lands of Domingo and Vicente,

says it is bounded "on the west by the bay of San Francisco
52f and on the south by a ravine, a short distance south of the town of Oakland." This ravine, sometimes called San An-

tonio creek, flows westward through the central part of the rancho and empties into an arm of the bay of San Francisco, at or near where the present town of Oakland is situated. This arm of the bay, triangular in shape and containing an area of 1,550 acres, has sometimes been called the San Antonio bay. Its shores form a part of the boundary lines of and for a distance separates the lands allotted to Vicente from those allotted to Antonio.

Turning again to the proceedings for confirmation, we find that, after the decrees declaring the grant to be valid and binding upon this Government had become final, a survey was made which included only the lands set apart to Domingo and Vicente, and other surveys were made including only the lands of Antonio and Ignacio, and maps or plats of each of these surveys were made out and filed.

These surveys fixed the middle of the San Antonio creek and of the so-called San Antonio bay as the dividing line between the lands of Vicente and those of Antonio.

After these surveys had been made and filed, H. W. Carpentier *et al.* presented their petitions, in which they claimed adversely "so much land lying under the waters of that area of the bay of San Francisco known as the estuary of San Antonio up to the highest tide lines," * * * through mesne conveyances from the State of California.

After various proceedings and resurveys, which need not be specifically mentioned here, the court sustained Carpentier's petition,
52*g* and finally approved the survey which fixes the lines of said grant "to run along the inner shore, excluding therefrom and from the lands confirmed the waters of the bay of San Francisco and the arms thereof, and lands covered thereby, as far as the tides ordinarily flow at the full and change of the moon," and patents were issued by this office upon the survey so approved.

On September 2, 1896, Mary H. Gwin and Francisco Sanjurjo, claiming to be the owners of an interest in said land through mesne conveyances from Vicente Peralta, filed in this office their petition, accompanied by what purports to be a map of the entire Rancho San Antonio, which you certified was compiled from official data in your office. This is the only map, purporting to be a map, of the entire rancho which has ever been prepared and filed.

Upon this map you have so extended the western boundary lines from headland to headland along the shore of the bay of San Francisco as to include therein area of about 1,550 acres for the so-called San Antonio bay and of about 802 acres in the San Leandro bay which were explicitly excluded from the approved surveys upon which patents were issued.

In this *par*tition they ask that the map filed therewith be approved and that a patent issue thereon.

On September 22, 1896, this office considered said petition and refused to approve your map or issue an additional patent thereon for the reason that "the particular matter raised by the petition has
long since become *res judicata*," and I now have before me
52*h* for consideration petitioner's motion for review and reversal of that decision.

In support of this motion it is contended by the petitioners that the district court had no jurisdiction to direct a resurvey of said land, and that for that reason the patent heretofore issued erroneously excluded the lands lying under the waters of the so-called San Antonio bay, which were included in the first survey presented for approval.

This contention cannot be sustained, and the motion must therefore be denied.

Under the provisions of the act of March 3, 1851, *supra*, and the act of June 14, 1860, 12 Stats., 33, any person claiming an interest in any lands included within such survey were entitled to present their petition to the district judge, setting forth their title, and praying the judge to hear and determine the issue thus presented.

Carpentier *et al.* availed themselves of the privileges thus offered and claimed title to the lands covered by the said San Antonio bay and erroneously included in the original survey.

Even if the district court did not otherwise have power *sua sponte* to order the original survey into court and direct the correction of the apparent error therein, it certainly ad jurisdiction under the statutes cited to entertain Carpentier's petition and direct that the survey be made to conform to the proper limits of the grant, and such an action was not contrary to the Supreme Court's mandate, because it expressly directed that the district court take
52*i* "such further action as according to the right and justice and the laws of the United States ought to be had."

If further authority was needed to overthrow the position of the petitioners, attention might be called to the case of Guyer *vs.* Banning, 167 U. S., 723, where the Supreme Court expressly declared that the district court had power under the said act of March 3, 1851, to direct a resurvey in order that its decree fixing the boundaries might be properly executed.

Having then act*ing* within its jurisdiction in directing the correction of the survey, and that action having become final, this office never had at any time power to direct otherwise, and it very properly issued patent upon the survey as approved. See Martinez *vs.* United States, 22 L. D., 105.

If an additional reason should be given for denying this motion, one which, to my mind, is entirely conclusive may be found in section 15 of said act of March 3, 1851, which provides "that final decree rendered by said commissioners, or by the district or Supreme Court of the United States, or any patent issued under this act shall be conclusive as between the United States and the claimants only, and shall not affect the interests of the third persons."

After following and citing the language of numerous other decisions, the Supreme Court in the recent case of Guyer *vs.* Banning, *supra*, concludes by using the following language:

"A patent having been accepted by the patentees and being uncancelled, the plaintiffs in this action claiming under the
52*k* patentees cannot recover lands not embraced by it even if such lands are embraced by the lines established by the decree

of confirmation, conclusive presumption being that the patent correctly locates the lands covered by the confirmed grant."

It is unnecessary to comment upon these authorities, which plainly declare that the present applicants are concluded both by the final decree of the circuit court and the issuance of patent thereon.

The motion for review is therefore denied.

Messrs. Thayer & Rankin, attorneys of this city, representing the petitioners, have been notified of this action.

Very respectfully,

(Signed) F. W. MONDELL,
Assistant Commissioner.

53 UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

James T. Boyd, of the city of San Francisco, being duly sworn, deposes and says that he is an attorney of this court and one of the attorneys for the said petitioners; that he has read the aforegoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

Deponent further says that he makes this verification because the facts stated in said petition are within his knowledge, and he is better informed in relation thereto than are the said petitioners.

JAMES T. BOYD.

Sworn to this 28th day of M'ch, 1900, before me—

JOHN FOUGA,
Deputy Clerk U. S. District Court,
Northern District of California.

54 In the District Court of the United States for the Northern District of California.

THE UNITED STATES }
vs } No. 100. Land Cases.
VICENTE PERALTA and Others. }

You will please take notice that we shall move the district court of the United States for the northern district of California, at the court-room of the court, in the Appraisers' building, in the city of San Francisco, on Monday, the 9th day of April, in the year 1900, at the opening of the court or as soon thereafter as counsel can be heard, for a rule or order of said court commanding the United States to issue or cause to be issued to the said claimants, confirmees, Antonio Peralta, Vicente Peralta, Ignacio Peralta, and Domingo Peralta, or to such of them as may be entitled thereto, a patent for the lands of the Rancho San Antonio in conformity with the approved official plat of the survey of said rancho now on file in the Department of the Interior of the United States, in execution of the decree of this court in this proceeding made and entered on the 30th day of November, 1859 (filed December 1, 1859), or of so much and

such portions of the said lands as have not been already patented to them or any of them on or before a day to be fixed in such rule or order, or to show cause before this honorable court at a time
55 and place to be also fixed in said order why the United States has not issued such patent or caused it to be issued; that such motion will be founded on the petition hereto annexed.

And for such further and other or other and further order and relief in the premises as may be just and agreeable to equity.

Dated San Francisco, March 28th, 1900.

MARY E. H. GWIN,
MIERS F. TRUETT,
By BOYD & FIFIELD,
Their Attorneys.

JAMES T. BOYD, *Of Counsel.*

To Hon. Frank L. Coombs, attorney of the United States for the northern district of California.

Endorsed: Filed Mar. 29, 1900. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

56 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES *vs.* VICENTE PERALTA ET AL. } No. 100.

Now comes the United States of America, by Frank L. Coombs, United States attorney for the northern district of California, and demurs to the petition herein on the following grounds, to wit:

I.

That the petition herein does not state facts sufficient to warrant or authorize the court in granting the relief prayed for.

II.

This court has no jurisdiction to grant the relief prayed for, for the reason that the relief prayed for, to wit, the issuance of a United States patent for the lands, and to the petitioner, pertains to the political power of the Government and abides solely within the authority and judgment of the Commissioner of the General Land Office and the President of the United States, and this court is without jurisdiction to direct or cause a patent to be issued as prayed for.

III.

For the reason that it appears from the petition that this court has made its final orders and entered its final decrees and
57 caused the same to be executed in conformity with law and to the full extent of the authority and jurisdiction of this court pertaining thereto.

IV.

For the reason that it appears from the petition that all the orders and decrees necessary and sufficient for the hearing and determination of this case, and conclusive of the issues in this cause, have been made and entered, and that its final decree, and to the full extent of its power and jurisdiction, has been made, entered, and executed, and that the court is without further jurisdiction hereto.

V.

For the reason that it appears from said petition that the said decree of November 30th, 1859, is not the final decree of this court, and that the same has been set aside and is now without force or effect.

VI.

For the reason that it appears that final orders and decrees were made, other than the decree of November 30th, 1859, subsequent to and setting the same aside, which were and are in final determination of the issues and matters involved in this cause, in full and final satisfaction of the claims of the confirmees herein, their heirs and assigns, and that upon such decrees due and legal steps were taken and proceedings were had toward carrying the same into full force and effect, and a patent has been issued in accordance with the same.

58

VII.

For the reason that it further appears that the said decree of November 30th, 1859, was executed according to its force and effect and according to the full power and jurisdiction of this court.

VIII.

For the reason that it appears that the decree made and entered June 4th, 1871, was and is the final decree of this court, determining the rights of the confirmees herein, and that a United States patent was applied for by the confirmees upon said decree and in accordance with the rights thereby determined, and especially with reference to the quantity and tract of land thereby confirmed, and that it further appears that said patent was issued in accordance therewith.

IX.

For the reason that it appears that the United States, acting in accordance with the rights assured by treaty of Guadalupe Hidalgo and in faith with the Mexican Republic and in accordance with the several acts of the Congress of the United States relating thereto, has issued its patent to the confirmees herein and to the full extent of its duty, its faith and its power, and in complete and full satisfaction of the rights of said confirmees, as ascertained in these proceedings instituted by said confirmees for such purpose.

X.

For the reason that it appears that the two thousand three hundred and fifty-two acres of land claimed by petitioner, or with reference to which the petitioner claims an interest, *was* by this court and by final decree, upon which patent was issued, determined and adjudicated not to be within the lands of claimants, and were
59 expressly excluded from them and from the said patent.

XI.

For the reason that it appears that the last and final decree and order of this court was made and entered in 1871; that an appeal was taken therefrom; that said appeal was dismissed by consent; that the claimants then and there and thereupon, on the 4th day of August, 1874, applied for and procured an order of this court permitting said claimants to proceed under the final decree aforesaid, and that the Commissioner of the General Land Office caused to be prepared and recorded a patent of the United States in accordance with said decree and in accordance with the application of the confirmees; that said decree and orders were and are *res judicata*.

XII.

For the reason that it appears that the confirmees herein accepted in good faith and as conclusive of their rights and interests in and to the lands of which they claimed title under the decree of June 4th, 1871, and applied for an order of this court to proceed thereunder and in execution thereof and to procure a United States patent for the lands confirmed thereby.

XIII.

For the reason that it appears that when the said decree of 1859, herein invoked by petitioner, was set aside or superseded by other and further decrees as aforesaid, that the confirmees herein and the said confirmee from whom petitioner claims title never appealed therefrom, but, on the contrary, proceeded with the trial of the
60 cause and the proceedings subsequent thereto, all with the view of having the title to the lands in controversy confirmed to them or to him, as to the court might seem just and proper, according to the law and the evidence to be adduced in the further hearing thereof.

XIV.

For the reason that it appears that the said confirmees have never, nor has either of them ever, appealed from the said decrees, nor from either of them, and that the same were accepted by them as conclusive of the issues herein.

XV.

For the reason that it appears from said petition that every act has been done and every decree executed and every order enforced necessary and required under the law and the premises to a com-

plete and full determination of the issues herein and to the ascertainment and settlement of the claims of the confirmees as contemplated and provided by the law, and especially by the acts of Congress relating thereto, and that the last act of the Government of the United States of America has been done and performed in the issuance of its patent, according to its complete and lawful authority, and that this court is without other or further jurisdiction in this cause.

That, for the reasons and for each and every reason above stated, this court is without other, further, and without any jurisdiction in this cause, and especially to grant the prayer of petitioner herein.

Wherefore the said United States prays that the motion of Mary E. H. Gwin herein be denied, that her petition herein be dismissed, and for such other and further relief as to the court may seem just and proper in the premises.

FRANK L. COOMBS,
United States Attorney.

61 Endorsed: Service of the within demurrer by copy admitted this 4th day of April, 1900. Boyd & Fifield, attorney- for petitioners. Filed Apr. 4, 1900. Geo. E. Morse, clerk.

62 In the District Court of the United States for the Northern District of California.

THE UNITED STATES
vs.
VICENTE PERALTA (GWINN and TRUETT, Interveners). } Land Case No. 100.

Boyd & Fifield, for the petitioner.
Frank L. Coombs, United States attorney.

HAWLEY, *District Judge* (orally):

The petition of Mary E. H. Gwinn, as intervener herein, having been heretofore dismissed without prejudice, a new petition has been filed by her and one Miers F. Truett asking the court to grant the same relief as was prayed for in the former petition. To this petition a demurrer has been interposed, upon the ground, among others in said demurrer specifically mentioned, "that the petition herein does not state facts sufficient to warrant or authorize the court in granting the relief prayed for."

The present petition is not subject to the objection made at the former hearing to the form of the pleadings, and that portion of the opinion which discusses that question may be said to be now eliminated from the case, because the present petition does set forth the steps that were taken and the orders and decrees that were made and rendered by the district court after the entry of the decree of November 30, 1859 (filed December 1, 1859), and states in detail certain facts concerning the plat of survey of November 25,
63 1895, made by the surveyor general, upon which the petitioners rely, and the action of the officers of the General

Land Office in regard thereto. It will thus be seen that there are many details in the facts set out in this petition that were not embodied in the former petition; but these additional facts simply present the questions herein involved more clearly and distinctly than before. The legal principles are precisely the same as were presented, discussed, and decided by this court in United States *v.* Peralta, 99 Fed., 618, and the views therein expressed are as applicable to this petition as to the former one. The reasons given by the Assistant Commissioners of the General Land Office to the surveyor general (which are annexed to and made a part of the petition) for refusing the petitioner's request for the issuance of a patent, in accordance with the survey of the surveyor general of California made in 1895, are in all respects consistent with the views expressed in the former opinion. Their conclusion in regard thereto is identical, viz: "That the particular matter raised by the petitioner has long since become *res judicata*." In the light of all of the facts and of the consideration heretofore given to this case, I deem it unnecessary to again discuss the same questions. It is enough to say that I have carefully read the petition, the elaborate and exhaustive brief filed by the learned counsel on behalf of the petitioners, and examined the numerous authorities cited therein, and my conclusion is that the demurrer should be sustained, the motion of the petitioners be denied, and the petition dismissed. It is so ordered.

Endorsed: Filed May 28th, 1900. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

64 In the District Court of the United States for the Northern District of California.

UNITED STATES
v.
VICENTE PERALTA; MARY E. H. GWIN, Intervener. } Land Case No. 100.

Demurrer to Petition for the Enforcement of a Judgment and for an Order to Compel the United States to Issue a Patent.

On July 27, 1899, Mary E. H. Gwin, intervener herein, filed the following petition: "The petition of Mary E. H. Gwin, intervening in this proceeding for her interest, by leave of the court first had and obtained, respectfully shows that heretofore, to wit, on the 21st day of January, in the year 1852, Antonio Peralta, Vicente Peralta, Ignacio Peralta, and Domingo Peralta, claiming lands in California by virtue of a right and title derived from the Spanish and Mexican governments, presented to and filed with the board of United States land commissioners, constituted under the act of Congress entitled 'An act to ascertain and settle the private land claims in the State of California,' passed March 3rd, 1851, their claim for the lands of the rancho of San Antonio, in said State, together with such documentary evidence and testimony of witnesses

as the petitioners relied upon in support of their
65 said claim; that thereupon the said board, when the case was ready for hearing, proceeded to and did examine such claims upon such evidence and the evidence produced in behalf of the United States, and did decide upon the validity of the claim, and did certify its decision, with the reasons on which it was founded, in due time to the then district attorney of the United States in and for the northern district of California; that afterwards, and after due proceedings had in this court, this court in land case No. 100 did review the said decision of said commissioners, and did affirm the validity of the claim of said petitioners, and did render judgment on the pleadings and evidence in the case by its decree duly given and made on the 26th day of January, in the year 1855; that afterwards, and on appeal by the United States duly granted by this court to the Supreme Court of the United States, that tribunal, by its decision duly given and made at the December term, in the year 1856, did affirm the validity of the grant and the claim of the said petitioners thereunder, and did remand the case to this court for further proceedings in accordance with its opinion. Your petitioner further shows that thereafter this court by its decree duly given and made on the 30th day of November, in the year 1859 (filed December 1, 1859), duly amended its said decree to conform to the said decision and opinion of the Supreme Court. Your petitioner further shows that afterwards, and on the 23rd day of July, in the year 1866, the Congress of the United States passed an act entitled 'An act to quiet land titles in the State of California;' that by the 8th section of said act it was provided that in the event that no
66 survey of the said grant had been before the passage of said act requested by said confirmees, nor had any such survey been requested within ten months after its passage, the duty was devolved upon the surveyor general of the United States for California, as soon as practicable thereafter, to extend the lines of the public surveys over said grant, and to set off in full satisfaction of the grant the quantity of land confirmed in the said decree, as nearly as could be done in conformity with such decree. Your petitioner further shows that no survey of the grant of the San Antonio rancho confirmed in this proceeding had been requested by the confirmees or their assigns before the passage of said act, nor had any survey thereof been requested by them within ten months after the passage of said act, nor had any such survey been made, and it thereby became the duty of the surveyor general of the United States for California, as soon as practicable from the expiration of ten months from the passage of said act, to set off, in full satisfaction of such grant and according to the lines of the public surveys, the quantity of land confirmed in the final decree herein, as nearly as could be done in accordance with such decree; that afterwards, and on or about the 25th day of November, in the year 1895, and as soon as practicable after the passage of the said act of July 23rd, 1866, the said surveyor general duly made, approved, and certified a plat of the survey of the said rancho of San Antonio in accordance with and in part execution of the said decree of this

court; your petitioner here further shows that she is interested in the lands of the said rancho under the said claimants and confirmees, and that her title thereto was
67 derived by mesne conveyances from the said confirmees, as will more fully appear by reference to the public official records of the counties of Contra Costa and Alameda, in the State of California, to which records she prays leave to refer and makes them a part of this her petition. Your petitioner further shows that thereafter the said plat of survey was, on or about the second day of September, in the year 1896, presented to the honorable the Commissioner of the General Land Office of the United States, at the city of Washington, District of Columbia, together with duly certified copies of said several decrees and an authentic certificate of such confirmation, by your petitioner, Mary E. H. Gwin, and one Francisco Sanjurjo, since deceased, together with the deraignment of their respective titles thereunder from the said claimants, confirmees, Vicente, Domingo, Antonio, and Ignacio Peralta, with a request that he issue or cause to be issued to said claimants, confirmees, Vicente Peralta and others, a patent for the lands of the rancho in accordance with such plat of survey in due form of law. Your petitioner further shows that the said Commissioner, whose duty it was to prepare and cause to be properly signed and issued, upon receipt of such plat of survey and certificate of confirmation, a patent to the said claimants, confirmees for the said lands, although often requested, has neglected and refused and still does neglect and refuse, and did, on the 22nd day of January, in the year 1898, expressly refuse to prepare and issue or cause to be issue such patent, to the great damage of petitioner; that thereafter, and within due
68 time, your petitioner here duly took and perfected an appeal from the said refusal and decision of the said Commissioner to the honorable the Secretary of the Interior of the United States, which appeal was in due time heard and considered, and on the fifth day of July, in the year 1898, the said refusal and decision by the said Commissioner was by the honorable the said Secretary expressly approved and affirmed, and he, the said Secretary, refused and does still refuse to issue or to order issued a patent for the lands of the said rancho to the said claimants, confirmees, as aforesaid, or to any one for their use or at all, to the great damage of your petitioner. Your petitioner further shows that the act of the said surveyor in making and certifying the said plat of survey was the act and deed of the said The United States; that the said plat was accepted by your petitioner on behalf of the said claimants, confirmees; that the same has never been appealed from, reversed, or set aside; and your petitioner prays leave to refer to the said plat of survey, now on file and of record in the proper land office of this district and in the Department of the Interior of the United States, or to a certified copy thereof, and to make the same a part of this her petition. Wherefore your petitioner prays that the decree of this court so made and entered in this proceeding on the 30th day of November, in the year 1859 (and filed December 1, 1859), may be ordered to be executed; that the United States may, by the order and

judgment of this court, be directed and required to cause to be made, signed, and issued to the said claimants, confirmees, in the proceeding its patent in due form of law for the lands of the
69 rancho of San Antonio, or for so much and such parts thereof as have not heretofore been patented to them or any of them, by a day to be fixed in such order and judgment, and that in default thereof the United States show cause before this court, at a time and place to be fixed in such order and judgment, why she has not so made, signed, and issued, or caused to be made, signed, and issued, such patent, and that your petitioner may have such further and other or other and further order and relief in the premises as may be just and agreeable to equity."

The United States of America, by and through its attorney, Frank L. Coombs, United States attorney for the northern district of California, demurs to the petition of Mary E. H. Gwin, filed herein, and for cause of demurrer shows to the court the following: "First. That the petition herein does not show from whom petitioner derives or claims to derive title to the lands or interests in controversy. Second. That it does not appear, and as a matter of fact is not true, that the decree of this court made on the 30th day of November, 1859, and referred to by petitioner, was and is the final decree of this court in and in relation to the matters and issues involved in this cause. Third. That the decree made by this court on the 30th day of November, 1859, and referred to as a final decree with reference to the lines of said grant established thereby and with reference to the surveys directed thereunder, but was subsequently thereto changed and modified with reference to said lines and surveys by other decrees, and especially by a decree of this court made on the
70 4th day of October, 1871, which was and is the final decree of this court and the final order with reference to said lines and surveys. Fourth. That it does not appear from said petition that the act of Congress of July 23, 1866, cited and referred to in said petition, empowered the surveyor general of the United States for California to do and perform the things, especially in reference to the plat and survey alleged to have been transmitted to the Commissioner of the General Land Office, in Washington. Fifth. That the map and survey made by the surveyor general of the United States for California, as aforesaid, was made contrary to and without authority of law, and without authority of this court, and in defiance of its order and decree, and especially in defiance and in contravention of its decree of October 4, 1871, in relation thereto, as fully appears by the records in this cause. Sixth. That it does not appear from the petition that there was not a request made in conformity with law for a survey of the lands confirmed by the decree of October 4, 1871, and in conformity therewith, and it does not appear that the surveyor general aforesaid did not transmit or cause to be transmitted a proper map or survey of said lands in conformity with said decree; that it does not appear that any or all of the requirements of law in relation to such matters were not strictly complied with under and by virtue of said final decree of October 4, 1871. Seventh. That this court has no jurisdiction over these

proceedings, having heretofore, to wit, on the 4th day of October, 1871, fully determined by its decrees made and entered
71 on said day all of the matters in controversy pertaining to the validity of said grant and the survey and lines established thereunder, and for the further reason that in conformity with said decree patents have been issued to all of the claimants by the United States of America and have been accepted by them, their heirs and assigns, for more than twenty years last past. Eighth. Further, that this court is without jurisdiction for the reason that it appears from the proceedings herein that the particular lands claimed by the petitioner were determined in these proceedings to be lands held by the State of California by reason of its sovereignty and were awarded in said decree to the particular interveners claiming under the said State of California, and were ordered therein not to be included in, but to be excluded from the lines of said Rancho San Antonio, as the same were established by said final decree of confirmation. Ninth. The court is without jurisdiction for the reason that it appears upon the petition herein that petitioner presented her application and petition to the Commissioner of the General Land Office, asking for an adjudication of her rights and for a patent to the lands claimed by her, which, as appears by the petition herein, were determined upon by said Commissioner, and upon appeal being taken to the Secretary of the Interior of the United States by petitioner the said decision of the Commissioner was confirmed and approved. Tenth. That this court is without authority and jurisdiction for the reason of the causes above alleged to give the relief sought in this petition or to order and direct that a patent or any patent at all be issued by the Gov-
72 ernment of the United States of America or by any of its agents acting thereunder to said lands or any part thereof. Eleventh. That it does not appear that any of the acts directed to be done and performed by the final decree of this court have not been done in conformity therewith and with law. Twelfth. That the petition does not state facts sufficient to entitle the petitioner to the relief demanded therein."

The decree of 1859, which is claimed by petitioner to be the final decree, reads as follows: "It satisfactorily appearing to the court that in the decree of this court heretofore entered in this cause and affirmed on appeal by the Supreme Court of the United States a clerical error has intervened, and that the said decree is repugnant and inconsistent with itself, and it further appearing to this court that the northern boundary of the tract of land confirmed to said claimants is erroneously described as running by the southern base of the cerrito therein mentioned, whereas the said northern boundary, as declared and adopted by the Supreme Court of the United States in the opinion of said court in this case, is 'the rivulet which issues from the mountain range and runs along the foot of said cerrito of San Antonio, and at the entrance of a little gulch there is a rock elevating itself in the form of a monument and looking towards the north,' and it appearing to this court that the rivulet so adopted as the said northern boundary runs along the base of the said cerritos

of San Antonio and not along the southern base thereof, and it further appearing that the ridge of mountains constituting the eastern boundary of said rancho is erroneously de-
73 nominated its western boundary, as is manifest from the face and terms of the decree itself: It is, on motion of the counsel for the parties interested in said claim, and the district attorney being present and not objecting thereto, ordered that the said decree —, and the same hereby is, construed and amended by substituting the word 'northern' for 'southern' where the word 'southern' the first time occurs in said decree, and the word 'eastern' for 'western' where the latter word first occurs in said decree.

OGDEN HOFFMAN,
U. S. Dist. Judge.

(Endorsed:) Filed December 1, 1859."

The record in the original case of United States of America *v.* Vicente Peralta *et al.*, No. 100, shows that on June 5, 1871, the following decree was entered in said cause:

"This cause came on this day again to be heard upon objections to the modified survey filed in this cause and was argued by counsel; and thereupon and in consideration thereof it is ordered, adjudged, and decreed that the said modified survey be, and the same is hereby, set aside as not being in conformity with the direction of this court heretofore entered and given in this cause; and it is further ordered, adjudged, and decreed that the said survey hereby set aside be modified between course 93 and course 113, as the same are laid down on the plat, heretofore filed in this cause, of the survey of said lands made by James T. Stratton, United States deputy surveyor, and approved by J. W. Mandeville, United States surveyor general for the State of California, on the 3rd day of March, 1860, so as to include all of the lands between said course down to the ordinary high-water line and exclude only so much land between
74 said courses as is covered by the tide- which happen between the full and change of the moon, twice in 24 hours; and it is further ordered, adjudged, and decreed that the surveyor general of the United States for the State of California cause said survey hereby set aside to be modified, without delay, in accordance with this decree and return a plat of the same into this court for its approval; and, in determining the line of ordinary high water between the courses aforesaid, it is further ordered, adjudged, and decreed that the said surveyor general adopt the line fixed as such by the officers of the United States Coast Survey as the same is delineated on the plat marked 'Exhibit Rogers No. 1' and described in the field-notes of said survey, copies of which are on file in this cause.

OGDEN HOFFMANN,
District Judge."

And on August 4, 1871, a decree approving the survey made in conformity with the decree of June 5, 1871, was entered as follows: "This cause came on this day again to be heard, and it appearing to the court that no exception has been filed to the modified survey

heretofore made under order of this court and a plat of which was filed in the clerk's office of this court on the 26th day of July, 1871, now, therefore, on motion of Williams & Thornton, due notice thereof having been given, it is ordered, adjudged, and decreed, *that* this court doth hereby order, adjudge, and decree, that said modified survey be, and is hereby, approved as a true and correct location of the lands confirmed in the above-entitled cause. The survey of which confirmation is hereby made contains eighteen thou-
75 sand eight hundred and forty-eight $\frac{98}{100}$ (18,848.98) acres and is the same executed under the order and direction of this court by decree entered in this cause on the 5th day of June, 1871, a duly certified plat whereof was filed in the clerk's office of this court, as aforesaid, on the 26th day of July, 1871, and is marked 'Approved August 4th, 1871, Ogden Hoffman, dist. judge,' and attached hereto as a part of this decree.

OGDEN HOFFMAN,
U. S. Dist. Judge."

Boyd & Fifield, for petitioner.
Frank L. Coombs, U. S. attorney, for the United States.

HAWLEY, *District Judge:*

The petition and demurrer which have been copied verbatim in the foregoing statement are deemed sufficient to explain the nature and character of this proceeding and to render it unnecessary to refer in detail to the steps that were taken in the original case prior to the rendition of the decree of November 30, 1859 (filed Dec. 1, 1859).

For the purpose of disposing of the questions raised by the pleadings herein, it will be admitted without discussion that the court has jurisdiction and is possessed of the inherent power and authority to do whatever is necessary to be done in order to enforce its lawful decrees. It must not, however, be understood by this admission to include the proposition that in proceedings like the present the court has any jurisdiction, power, or authority to order or direct the issuance of a patent by the United States, as prayed for by the petitioner. That branch of the question will be hereafter referred to.

76 The pleadings upon this motion are peculiar in this: that the petition of the intervener does not state all the proceedings in the suit of United States *v.* Peralta, and the United States, instead of answering the petition and setting up all the facts, demurs thereto, thereby admitting, in the eye of the law, in so far as the demurrer can be treated as a general demurrer, that the allegations of the petition are true.

It is apparent that the petition does not state all of the steps that were taken by the court after the decree of 1859. It entirely ignores any reference to the proceedings of this court in rendering the decree of 1871, and of the steps taken thereunder which resulted in the issuance of a patent to the claimants in the original suit.

Counsel in illustrating their arguments in favor of or against the demurrer have detailed many facts in regard to the proceedings had

in the original case and the decrees rendered therein and the various steps taken thereunder.

The contention of the petitioner's counsel is that the court should not consider any facts whatever except those mentioned in the petition and admitted by the demurrer.

The argument on the part of the United States is to the effect that the court is bound to take judicial notice of its own orders and decrees made in the original suit, regardless of the question whether they are set forth or referred to in the petition under consideration or not.

In relation to these contentions it will be observed that the
77 demurrer, with the exception of a few points made therein, must be considered as a special demurrer, if the nature of a special plea, setting forth facts why the relief asked for should not be granted. It does not admit, but, on the contrary, expressly denies, that the decree of this court made November 30, 1859, and filed December 1, 1859, "is the final decree of this court in relation to the matters and issues involved in this cause," and in this connection avers that the decree of 1859, with reference to the lines of the grant established thereby and with reference to the surveys directed thereunder, was subsequently changed and modified with reference to said lines and surveys by the decree made October 4, 1871 (and other decrees), and that this was and is the final decree of this court with reference to said lines and surveys.

The pleading interposed by the United States is not a speaking demurrer in the sense that it endeavors to bring in a state of facts independent of the records in the original cause, and to bind the petitioner by such statement. This cannot be done. The pleading, by whatever name it may be called, only seeks to complete the record of the decrees made in the original case, without a consideration of which the court could not properly decide the questions sought to be raised by an imperfect or incomplete statement of the record.

As the petition does not contain all the essential facts of the original case with reference to the decree of 1859 and of the steps taken by the court thereunder, I fail to see any good or substantial reason why such facts could not be as well supplied by a
78 special demurrer or plea as by an answer. The principles in relation to the effect of the special demurrer presented herein bear a close analogy to, if not entirely consistent with, the well-settled rule that a demurrer reaches back to the first error in the pleadings, and judgment may properly be given thereon against the party who committed it.

As was said by Marshall, C. J., in Cooke *v.* Graham, 3 Cranch, 229, 235, "When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole and go to the first error."

6 Ency. Pl. & Pr., 326, and authorities there cited.

This general principle is often applied where, as here, the defect pointed out is one of substance and not of mere form.

The end sought to be reached by the demurrer and the intention of the pleader in regard thereto are in substance identical with the object to be accomplished by a special plea.

The object of a plea in equity is to save the parties the expense of a trial upon all the matters alleged in the bill. The purpose of the plea is to reduce the cause or some part of it to a single point, which, if sustained, constitutes a complete defense to the suit, or at least to those portions of the bill to which the plea applies.

In Farley *v.* Kitson, 120 U. S., 303, 314, the court said: "The office of a plea is not like an answer, to meet all the allegations of the bill, nor like a demurrer admitting those allegations, to deny the
equity of the bill, but it is to present some distinct fact which
79 of itself creates a bar to the suit, or to the part to which the plea applied, and thus to avoid the necessity of making the discovery asked for and the expense of going into the evidence at large. Mitford Pl. (4th. ed.), 14, 219, 295; Story Eq. Pl., secs. 649, 652."

In Adams' Equity (8th ed.), 336, it is said: "The principle of a defense by plea is that the defendant avers some one matter of avoidance or denies some one allegation of the bill, and contends that assuming the truth of all the allegations in the bill, or of all except that which is the subject of denial, there is sufficient to defeat the plaintiff's claim. It is applicable, like a demurrer, to any class of objections, but the most usual grounds of plea are: 1, Want of jurisdiction; 2, personal disability in the plaintiff; 3, a decision already made by the court of chancery or by some other court of competent jurisdiction."

See also United States *v.* California and Oregon Land Co., 148 U. S., 31, 39; 16 Ency. Pl. & Pr., 598.

It is true that the steps to be pursued under a special plea are in some respects differently provided for, but inasmuch as the practice here pursued was not objected to on that ground, and the hearing on the special demurrer does not otherwise affect the substantial rights of the parties, the irregularities in the practice (if any exist) may be deemed wholly immaterial.

U. S. *v.* Gerney, 4 Cranch, 333.
Zimmerman *v.* So Relle, 80 Fed., 417, 420.

80 The affirmative facts set forth in the demurrer are shown to exist by an inspection of the records in the original case.

I am of opinion that it is the duty of this court to assume without any proof on either side the facts which are not controverted by the special demurrer or plea to be as set out in the petition; and with reference to the facts which are controverted by the special demurrer the court must assume the facts therein set forth to be as therein stated.

With reference to the questions thus presented, I am of opinion that this court, after the rendition of the decree of 1859, under the provisions of the statutes of 1851, 1860, and 1866, retained jurisdic-

tion of the cause and had the power and authority to reject or approve any survey thereafter made or to otherwise change or modify the decree upon proceedings properly brought before it for that purpose.

If the decree of 1859 was final in the sense that it determined the validity of the grant, it was not a final decree in the full sense of that term because it did not determine the correctness of the survey and could not do so until it was made by the surveyor general and presented to the court. This was accomplished by the orders and decrees of the court made in 1871, and the decree approving the survey must therefore be treated as the final decree of this court.

It is not denied that a survey thereunder was made by the surveyor general of the United States and approved by the court, and that subsequent thereto a patent was issued in conformity therewith; this court was thereby deprived of any further jurisdiction in the premises.

81 From the arguments of counsel it appears that in the earlier stages of the proceedings in the original case, touching the location and boundaries of the grant, the question arose whether the State of California had the superior right by virtue of its sovereignty over the tide and submerged lands in San Francisco bay, or whether such lands should be included in the grants from the Mexican or Spanish governments. The court was called upon to determine whether or not the boundary line of the lands granted to Peralta should or should not be confined to the high-water mark along the bay and estuary. On this point counsel for the petitioner in his brief says: "Our contention here * * * is that when the decree of this court declared the western boundary line of the rancho of San Antonio, as defined in the grant from Mexico, as being a line along the bay of San Francisco, it did not mean a line running through the creeks and sloughs with which this shore of the bay from Contra Costa to Santa Clara is intersected. It did not mean running up those creeks and sloughs and taking the banks of the creeks and sloughs instead of the shores of the bay as being the boundary." This matter is here referred to simply for the purpose of giving a better understanding with reference to the controversy between the parties as to the respective surveys.

The facts set forth in the petition and demurrer present a case which was brought in 1852, under the provisions of the act of Congress of 1851, to establish a claim to the lands of the rancho of San Antonio by virtue of a right or title derived from the Span-

82 ish and Mexican governments. The various steps taken in said case resulted in the decrees of this court entered in 1859 and 1871, and culminated in the issuance of patents to the claimants in 1877. The quantity of land claimed embraced about 46,685 acres, and the amount embraced in the patents was only 44,333 acres, being 2,352 acres, or thereabouts, less than was included in the survey made in 1895. It will thus be seen at a glance that the present proceeding was instituted more than forty years after the decree of 1859, upon which petitioner relied, was rendered, and about 28 years after the rendition of the decree of 1871, upon which the

United States rely, and over twenty years after the close of the proceeding in the original case by the issuance of patents in conformity with the decree of this court of 1871. The patentees, under whom petitioner claims, acquiesced in the correctness of the decree of 1871, and accepted the patents issued thereunder without objection. The proceedings were, so far as the record shows, conducted in good faith, and have remained unchallenged for over twenty years, during which time vast interests have been acquired by other parties in the lands not embraced in the patents. Under such a state of facts it becomes apparent that petitioner must necessarily present a clear case, one entirely free from doubt as to her legal and equitable rights in the premises, in order to obtain any relief.

The patents as issued in effect decide that the lands described therein include all the lands to which the claimants were entitled under the decree and survey. If the decree of 1871 and the
83 survey therein referred to did not embrace all the lands to which the grantors of the petitioner were entitled, they should have taken the necessary steps to have the same set aside or modified. By the issuance of a patent, presumably at their request, the entire proceedings were at an end. The final decree of this court was enforced and patents were issued in accordance therewith. The petitioner could not thereafter invoke the power of this court to annul its action and to proceed under the decree of 1859, which had been changed by the decree of 1871.

The magnitude and importance of the questions herein involved are far-reached in their consequences, as will readily be seen by a careful perusal of the opinions of Mr. Justice Field, of Hoffman, district judge, and Sawyer, circuit judge, in the three cases of The United States *v.* Flint, Throckmorton, and Carpenter, 4 Saw., 42, 87, decided in 1876. These were suits of equity, brought in the United States circuit court of California, to vacate certain patents issued by the United States upon confirmed Mexican grants upon the ground that said patents were obtained by fraud. They were commenced nineteen years after the final decree in the United States district court and eight years after the issuance of the patent by the Government. The act of 1851 is discussed at great length, and a reference thereto is made for the purpose of giving the views ascertained as to its proper construction and effect by the learned judges who participated in the decisions. This court is not, however, called upon under the pleadings before it to discuss the merits of the case. The question as to the sufficiency of the petition to require an answer is alone
84 involved. To determine this question it is only necessary, as before stated, to inquire and decide whether from the averments in the petition and the so-called demurrer the decree of 1859 is the final decree of this court, and whether this court has any jurisdiction to order a patent to be issued as prayed for by petitioner.

The contention of petitioner is that the decree of 1859 is the final decree, and that the court was not possessed of any jurisdiction to thereafter change or alter the same, and that under the provisions of section 8 of the act of 1866 it became the duty of the surveyor general of the United States for California to survey the land as

described in said decree, and that the court had no power or authority to reject or disapprove of such survey, and upon such survey it became the duty of the United States to issue its patent in accordance therewith. An examination of the provisions of the statute and of the authorities upon which petitioner relies fails to convince me of the soundness of this contention.

Sec. 13 of the act of 1851 provides, among other things, that all lands, the claims to which shall be finally decided by the district or Supreme Court, shall be deemed, held, and considered as part of the public domain of the United States, and that "for all claims finally confirmed by the said commissioners, or by the said district or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it
85 shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same" (9 U. S. Stat., 631).

The amendatory act of 1860 requires the surveyor general after making a survey in pursuance with the provisions of section 13 of the act of 1851 to give notice of such survey by publication. Sec. 2 of this act provides "that the district courts of the United States for the northern and southern districts of California are hereby authorized, upon the application of any party interested, to make an order requiring any survey of a private land claim within their respective districts to be returned into the district court for examination and adjudication, and on the receipt of said order, duly certified by the clerk of either of said courts, it shall be the duty of the surveyor general to transmit said survey and plat forthwith to the said court."

Section 6 provides "that all surveys and locations heretofore made and approved by the surveyor general of California, which have been returned into the said district courts, or either of them, or in which proceedings are now pending for the purpose of contesting or reforming the same, are hereby made subject to the provisions of this act" (12 U. S. Stat., 33).

Section 8 of the act of July 23, 1866, entitled "An act to quiet land titles in California," upon which petitioner chiefly relied, reads as follows: "That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall
86 not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, 'to expedite the settlement of titles to lands in the State of California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections, within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the surveyor general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public

surveys to be extended over such land, and he shall set off in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree" (14 U. S. Stat., 218).

What is the jurisdiction, extent, and power of the district court and of the surveyor general under the provisions of these acts?

At the time of the rendition of the decree of 1859 grave doubts existed as to whether or not the district court had the power under that act to reject or approve the survey required to be made by the surveyor general of California.

With reference to the act of 1851, numerous authorities have been cited by the respective counsel, a few of which will be noticed.

In United States *v.* Fossatt, 21 How., 445, 450, where this
87 court, presided over by the learned district judge who rendered the decrees under consideration in the present case, had, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made, and from this decree the appeal was taken, the Supreme Court said: "It is asserted on the part of the appellants that the district court has no means to ascertain the specific boundaries of a confirmed claim and no power to enforce the execution of its decree, and consequently cannot proceed further in the cause than it has done. The 13th section of the act of 3d March, 1851, makes it the duty of the surveyor general to cause all provate claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same. It was the practice under the acts of 1824 and 1828 (4 Stat. at L., 52, 284) for the court to direct their mandates specifically to the surveyor designated in those acts; and in the case *Ex parte* Sibbald *v.* United States (12 Pet., 488) the duty of the surveyor to fulfill the decree of the court and the power of the court to enforce the discharge of that duty are declared in similar language in the acts of 1824, 1825, and of 18 -1. The opinion of the court is that the power of the district court over the cause under the acts of Congress does not terminate until the issue of a patent conformably to the decree."

In June, 1859, Judge Hoffman, in United States *v.* Executors of
Folsom, 7 Saw., 602, 612–617, was again called upon to pass
88 upon the question. In his opinion he states: "A decree having been entered at a former term confirming the claim in this case according to the boundaries mentioned in the grant, the appeal therefrom was, by consent of the district attorney, acting under the instructions of the attorney general, dismissed. A motion is now made that the survey be brought into court to be examined and passed upon, and that a final decree be entered confirming to the claimants the lands so surveyed. This motion is made that the court may exercise the jurisdiction which by the recent decision of the Supreme Court in the case of The United States *v.* Fossatt, 21 How., 445, it is supposed to possess." He then reviewed at great length the opinion of the Supreme Court in that case. His views in regard thereto are interesting and instructive. Among other things

he said: "That the Supreme Court have in their opinion laid down principles generally applicable to all cases I think is evident. In the first place, they discuss and decide the point whether this court has by the act of 1851 any authority to decide questions of extent, location, and boundary. Such questions they declare may be 'essential in determining the validity of a claim,' and the power to decide upon 'validity' involves the power to decide upon all questions of boundary. * * * I therefore think that in all cases where a decree of confirmation has been entered and a survey under it has been made on which a patent is about to issue, which survey is objected to as erroneous, it is the duty of the court to direct the survey to be returned to it that it may hear and determine the questions of location and boundary which may be raised."

89 So much for the act of 1851. We now direct our attention to the views expressed by the courts with respect to the amendatory act of 1860.

In United States *v.* Halleck, 1 Wall., 439, 454, Mr. Justice Field, in delivering the opinion of the court, after referring to the case of United States *v.* Fossat, and to the fact that the district court had ordered the new survey to be returned into court, and that proceedings in regard thereto were pending at the time of the passage of the act of June 14, 1860, speaking with reference to said act, said: "Whatever question might be raised as to the jurisdiction of the district court to supervise the survey previous to that act, there can be none since its passage. That act applies not merely to surveys subsequently made, but also to such surveys as had been previously made and approved by the surveyor general and returned into the district court upon objections to their correctness."

In the Fossatt or Quicksilver Mine case, 2 Wall., 649, 712, objections were made to the survey and location on the ground, among others, that the proceedings under the act of 1860 were not judicial, but purely executive and ministerial. It was, therefore, contended that the appeal from the order or the decree of the district court regulating the survey and location ought not to be entertained because the court could only determine the validity of the grant, leaving its survey and location to the executive department of the Government. Mr. Justice Nelson, in delivering the opinion of the court, in reply to these propositions, said: "We need

90 only refer to the opinion of this court, in the present case, the second time it was before us, as presenting a conclusive refutation of these several positions. The fundamental error in the argument is in assuming that the survey and location of the land confirmed are not proceedings under the control of the court rendering the decree, and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court and as much within its competency as the hearing of the cause and the rendition of its judgment, as much so as the execution of any other judgment or decree rendered by the court. This power has been exercised by the court ever since the Spanish and French land claims were placed under its jurisdiction.

* * * The powers of the surveyor general under these acts were as extensive and as well defined as under the act of 1851. The act of 1860 did not enlarge or in any way affect his powers. They remained the same as before."

With the view I take of the averments in the pleadings herein, I deem it unnecessary to discuss at any length the provisions of section 8 of the act of 1866, because, if the decree of 1859 is not the *final decree, that act has no application to the proceedings herein.* If the court retained jurisdiction under the acts of 1851, 1860, and 1864 up to the time of the decree of 1871 and thereafter until the patent was issued, that fact disposes of the motion made by the petitioner. The act of 1866 is not, and could not be, applicable to this case, except upon the theory of the petitioner that the decree of 1859 is the final decree, and that no survey was made there-

91 under until 1895, whereas the record shows, as averred in the pleading of the United States, that the decree of 1859 was supplemented and modified upon application of parties interested in some of the lands embraced therein by the decree of 1871. The act of Congress of 1866 may be more general in its character, scope, and effect than the previous acts. It will be observed, however, that the act does not repeal the provisions of the act of 1851, or of the amendatory act of 1860, or of the act of 1864.

But if it should be conceded that petitioner's contention is true, viz., that this court had no jurisdiction, power, or authority over the survey under the act of 1866, and that the Land Department was thereby vested with the exclusive jurisdiction to judicially determine whether or not the survey of 1895 conformed to the decree of 1859, the question would then arise whether this court has any jurisdiction in the present proceedings to compel the Commissioner of the General Land Office, the Secretary of the Interior, or the executive department of the Government to cause a patent to be issued in conformity therewith. Certainly not. If this court had no power to decide questions of locality and survey and the Land Department was vested with exclusive jurisdiction in regard thereto, how could this court in the present proceedings set aside the rulings in the Land Department refusing to grant a patent in conformity with the survey made in 1895?

There are no provisions in the act of 1866 to compel the Commissioner of the General Land Office or the Secretary of the In-

92 terior to approve the survey if it is deemed to be erroneous, or to give it any effect whatever if it is disapproved of for good reasons. For aught that appears in the petition, the survey of 1895 might have been rejected because it did not, in the opinion of the Land Department, conform to the decree, or the patent then applied for may have been refused because the decree of the district court of 1859 was not the final decree, and that the decree of 1871 had been enforced by the issuance of patents in conformity therewith, and that the question of title and boundaries of the grant were thereby finally disposed of. No case has been cited by petitioner's counsel that would authorize this court to order the Government or the officers of the Land Department to issue a patent in accordance

with that survey. None having been found, it will be presumed that none exists. If the patents issued in oursuance of and in conformity with the decree of this court, in 1871, approving the survey made by the surveyor general are, as hereinbefore declared to be, valid, then it necessarily follows that the relief asked for cannot be granted.

In De Guyer *v.* Banning, 167 U. S., 723, 736, *et seq.*, which was an independent action in ejectment, the plaintiffs offered in evidence, in support of their title, a patent which did not grant lands that were excluded from the surveyed claim, and contended that they had the right to go behind both the survey and patent and recover the possession of the lands so excluded, the same as they would have had the right to do if the lands had been included in both the survey and the patent. The court, with reference to this contention, said:

"In our opinion, if those who obtained the decree of con-
93 firmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the district court before the survey was transmitted to the General Land Office, or at least before it was acted upon and made the basis of a patent. The patent was not issued until nearly a year after the survey was made and certified. Under the act of 1851, it was within the power of the district court to have required a survey in exact conformity with its decree. Its jurisdiction over the subject did not end with the decree. The surveyor general was required by the statute (sec. 13) to cause an accurate survey to be made of all private claims finally confirmed under the act of 1851, and to furnish plats of the same. If he misinterpreted the decree; if he made an inaccurate survey, and excluded from it lands that were confirmed to the original claimants, the court had authority to compel the proper execution of its decree." After referring to many decisions of the Supreme Court upon this subject, the court said: "We are of opinion that while it may be true in some cases that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claimants, and, until cancelled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree;" and thereafter discussed at great length the effect of a patent; to
94 which opinion reference is here made, and to the authorities there cited.

See also De Guyer *v.* Banning, 91 Cal., 400, 402, and authorities there cited.

In Chipley *v.* Farris, 45 Cal., 527, 538, which involved the title to lands alleged to have been covered by a Mexican grant, and in respect to which there were proceedings under the act of Congress of March 3, 1851, it was contended on one side that the patent was conclusive upon all points of the case and put an end to all questions of lines and boundaries; on the other side it was insisted that the confirmation of the claim gave the claimant a perfect title, and

that he could not be divested of title to any lands embraced in the decree of confirmation by a patent that excluded a portion of them. In answering these contentions, the court said: "A patent issued under the act of 1851 is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former Government, and for the segregation of such land from the public lands of the United States, and it is a record which binds both the Government and the claimant, and cannot be attacked by either party except by direct proceedings instituted for that purpose (Leese *v.* Clark, 18 Cal., 535). While it stands, the claimant or those deriving title through him will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. Such being the nature and effect of the patent, the evidence offered by the plaintiffs to prove that the patent
95 was void was properly excluded. It is unnecessary, in order to give effect to a patent, to show an acceptance of it by the patentee. The general rule is that a patent takes effect upon its being issued, and it is unnecessary to show a delivery to or an acceptance by the patentee. * * * It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree, which is also incorporated into the patent, for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor, on the other hand, can it be limited by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting, as he must, the conclusive effect of the patent, make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect in an action of ejectment."

The merits of this case have been settled by the final decree of this court, and the patents issued in conformity therewith. If the present motion could be sustained and a new order made in
96 disregard of the final decree of this court, it would open up a new field of inquiry and create future litigation that would be endless. As was said by Mr. Justice Field, in United States *v.* Flint, *supra*, "Of course, under such a system of procedure, the settlement of land titles in the State would be postponed indefinitely, and the industries and improvements, which require for their growth the assured possession of land, would be greatly paralyzed."

The obligation resting upon the Government concerning the Mexican and Spanish grants are purely political in their character, and are settled and discharged in such manner and upon such terms as they deem expedient. To quote the opinion of Mr. Justice Field,

in Beard *v.* Federy, 3 Wall., 478, 492: "By the act of March 3d, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the Government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court, and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed by the action of its tribunals and officers that a claim asserted is valid and entitled to recognition, the Government acts and issues its patent to the claimant. This instrument is therefore record evidence of the action of the Government upon the title of the claimant. By it the Government declares that
97 the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former Government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the Government this record, so long as it remains unvacated, is conclusive, and it is equally conclusive against parties claiming under the Government by title subsequent. It is in this effect of the patent as a record of the Government that its security and protection chiefly lie."

The presumption of the law always is that the officers of the executive department of the Government, who are specially charged with the supervision of matters in relation to the issuance of patents, did their duty, and if, under any circumstances, their action can be sustained, it must be presumed that such circumstances existed.

I am of opinion that it is the duty of this court, under the facts herein presented, to decline to review the action of the executive department in refusing to issue a patent under the survey of 1895, and to decline to grant the motion of the petitioner to compel them so to do.

The affirmative facts set forth in the demurrer constitute a complete defense and bar to the relief prayed for by petitioner. The entire matter is *res judicata*.

From the views herein expressed and conclusions reached, it necessarily follows that the demurrer should be sustained and the petition dismissed. It is so ordered.

Endorsed: Filed Jan. 29, 1900. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

98 *Order Denying Motion.*

In the District Court of the United States for the Northern District of California.

THE UNITED STATES OF AMERICA
vs.
VICENTE PERALTA ET AL.; MARY E. H. Gwin and Miers F. Truett, Intervenors. } No. 100. Land Cases.

The motion of Mary E. H. Gwin and Miers F. Truett, intervenors, for a rule or order commanding the United States to issue, or cause to be issued, to the claimants, confirmees, Antonio Peralta, Vicente Peralta, Ignacio Peralta, and Domingo Peralta, a patent for the lands of the rancho of San Antonio in conformity with the approved official plat of the survey of said rancho now on file in the Department of the Interior, in execution of the decree of this court herein, made and entered on the 30th day of November, 1859 (filed December 1, 1859), having come on to be heard in its regular order on the calendar on the 30th day of April, in the year 1900, before the Hon. Thomas P. Hawley, a district judge of the United States, upon the verified petition of the intervenors and the demurrer of the United States thereto;

And having been argued in support of the demurrer by Frank L. Coombs, Esquire, United States attorney, and in support of the motion by James T. Boyd, Esquire, and William H. Fifield, Esquire, attorneys for the intervenors, and having been submitted for consideration and decision;

99 And this court, after due consideration had thereon, having, on the 28th day of May, in the year 1900, rendered its decision and filed its written opinion thereon:

Now, on this 28th day of May, in the year 1900, on motion of Frank L. Coombs, Esquire, United States attorney, it is by court now here ordered, adjudged, and decreed that the said demurrer be, and the same is hereby, sustained, and that the said motion be, and the same is hereby, denied, and the petition dismissed.

THOMAS P. HAWLEY, *Judge.*

Endorsed: Entered in Book No. 3, Judg'ts and Decrees, page 533. Filed Jul- 30, 1900. Geo. E. Morse, clerk, by John Fouga, deputy clerk.

100 *Notice of Motion for Appeal.*

In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES OF AMERICA
vs.
VICENTE PERALTA ET AL. } No. 100. Land Cases.

SIR: You will please take notice that we shall apply to the district court of the United States for the northern district of Califor-

nia to allow and grant to the intervenors and to each of them an appeal to the Supreme Court of the United States from the order entered on their motion on the thirtieth day of July, in the year 1900, on such security for costs as the said court shall prescribe.

And that this motion will be made on Thursday, the 16th day of August, in the year 1900, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated August 13th, 1900.

BOYD & FIFIELD,
Attorneys for Intervenors.

Frank L. Coombs, Esq., attorney for the United States.

Endorsed: Filed August 16th, 1900. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

101 *Order Granting Appeal.*

At a stated term of the district court of the United States for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 20th day of August, A. D. 1900.

Present: The Honorable James H. Beatty, United States district judge for the district of Idaho, presiding.

(Number and Title of Case.)

In this case the motion of Mrs. Mary E. H. Gwin and Miers F. Truett, intervenors, for an order allowing an appeal to the Supreme Court of the United States this day came on regularly for hearing, and after hearing James T. Boyd, Esq., attorney for said intervenors, in support of said motion, and Frank L. Coombs, Esq., United States attorney for the northern district of California, in opposition thereto, it is by the court ordered that said appeal to the Supreme Court of the United States from the order made and entered by the court herein on the thirtieth (30) day of July, in the year 1900, be, and the same is hereby, allowed and granted to the said intervenors and to each of them upon their or either of them giving bond on appeal as security for costs in the district and supreme courts, in case the said order of said district court shall be affirmed, in the sum of three hundred dollars ($300.00).

102 *Bond on Appeal.*

Know all men by these presents that we, Mary E. H. Gwin and Miers F. Truett, as principals, and A. D. Grimwood and John Benson, as sureties, are held and firmly bound unto the United States of America in the just and full sum of three hundred dollars, to be paid to the said The United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this twenty-first day of August, in the year nineteen hundred.

Whereas the above-bounden Mary E. H. Gwin and Miers F. Truett have prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree rendered by the district court of the United States for the northern district of California on the 30th day of July, in the year 1900, in a certain proceeding pending in said court wherein Vicente Peralta, Antonio Peralta, Domingo Peralta, and Ignacio Peralta are parties of the one part — The United States of America is the party of the other part, which order and decree was rendered on a motion of the said Gwin and Truett, intervenors, intervening for their interest under the said parties, Vicente Peralta, Antonio Peralta, Domingo Peralta, and Ignacio Peralta, against the said intervenors:

Now, the condition of the above obligation is such that if they, the said Gwin and Truett, or either of them, shall prosecute their appeal to effect and shall answer all costs in the said district and supreme courts in case the said order and decree of the district court shall be affirmed, then the above obligation to be void; else to remain in full force and virtue.

103

——— ———.

MIERS F. TRUETT. [SEAL.]
JOHN BENSON. [SEAL.]
A. D. GRIMWOOD. [SEAL.]

Witness to signature of Mrs. Gwin:

——— ———.

Witness to signature of M. F. Truett:
B. B. TRUETT.

UNITED STATES OF AMERICA, }
Northern District of California, } ss:

A. D. Grimwood and John Benson, being duly sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of three hundred dollars exclusive of property exempt from execution and over and above all debts and liabilities.

A. D. GRIMWOOD.
JOHN BENSON.

Subscribed and sworn to before me this 6th day of September, 1900.

J. S. MANLEY,
United States Commissioner for the Northern District of California, at San Francisco.

Endorsed: Filed Sep. 7, 1900. Geo. E. Morse, clerk. Form of bond & sufficiency of sureties approved. John J. De Haven, judge.

104 *Appeal to Supreme Court.*

THE UNITED STATES, Appellants,
vs.
VICENTE PERALTA & DOMINGO PERALTA.

To the honorable the Supreme Court of the United States:

The appeal of The United States, the above appellants, by A. Glassell, acting district attorney of the United States for the northern district of California, respectfully sheweth that on the — day of ——, A. D. 1851, the above-named appellees filed their claim before the board of commissioners for ascertaining and settling the private land claims in the State of California under the act of Congress of March 3d, 1851, praying for their confirmation of said claim.

That a final decree was made by the said board of commissioners, wherein it was, in substance, adjudged that the said appellees had not a good and lawful title to all of the lands described in said claim.

That after such final decree the said cause, together with the said decree and all the pleadings, proceedings, depositions, and evidence therein, was duly certified and removed into the district court of the United States for the northern district of California, and an appeal in all respects duly taken from the said board of commissioners to the said district court, and the said cause being removed into the said district court and issue being joined upon the petition filed in the
105 said court by the said appellees and the answer of the said United States by the district attorney of the United States, the said cause was tried anew upon the said pleadings, and the pleadings and evidence removed from the said board, as aforesaid, and such further evidence as was taken by order of the said district court, and such proceedings were thereupon had in the said district court that afterwards, to wit, on the 26th day of January, A. D. 1855, the said district court made a final decree whereby it was, in substance, adjudged that the said appellees have a good and valid title for the place called San Antonio to the whole extent of its boundaries particularly set out in the said decree of the said district court, which said decree of the said district court is, as the said district attorney of the United States believes, erroneous & ought to be reversed.

Whereupon the said district attorney, in behalf of the said United States, appeals from said decree of the said district court to the Supreme Court of the United States, and respectfully prays that the said decree of the said district court and all the pleadings, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said district court may be reversed and a decree made rejecting

the said claim with costs against the said appellees, or such other decree as to the said Supreme Court shall seem just.

San Francisco, January 26, 1855.

A. GLASSELL,
Acting District Attorney of the United States, &c.

Endorsed: Filed Jan'y 26, 1855. Jno. A. Monroe, clerk.

106 *Request to Make Transcript.*

United States District Court, Northern District of California.

THE UNITED STATES OF AMERICA
vs.
VICENTE PERALTA and Others. } Land Case No. 100.

Appeal of Mary E. H. Gwin and Miers F. Truett.

Record on appeal.

1900.
Mar. 29. Motion papers.
April —. Demurrer.
May —. Opinion on this hearing of Judge Hawley.
Jan'y 29. Opinion of Judge Hawley on former hearing.
July 30. Order denying motion.
Aug. 16. Notice of motion for appeal.
20. Order granting appeal.
Sep. 7. Bond on appeal.
Citation.
1855.
Jan. 26. Notice by attorney general of appeal to Supreme Court.

BOYD & FIFIELD,
Attorneys-at-law, 324 *Pine St., San Francisco, Cal.*

Clerk U. S. dist. court, northern dist. of California:

Please send copy of above papers as constituting record on appeal.

Yours, &c.,

JAMES T. BOYD,
Of Counsel for Appellants.

Endorsed: Filed September 14th, 1900. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

107 I, George E. Morse, clerk of the district court of the United States for the northern district of California, do hereby certify that the foregoing and hereunto annexed one hundred and six (106) pages, numbered from 1 to 106, inclusive, contain a full, true, and correct transcript of the record in said district court in the case entitled "The United States *vs.* Vicente Peralta," No. 100 (L.C. N. D.), made up pursuant to the request of the attorney for appellants. I

further certify that the cost of said record, amounting to $52.40, has been paid by appellants.

Attest my hand and the seal of said district court this 2nd day of October, A. D. 1900.

[Seal of the U. S. District Court, Northern Dist. of California.]

G. E. MORSE, *Clerk.*

Endorsed on cover: File No., 17,926. N. California D. C. U. S. Term No, 441. Mary E. H. Gwin and Miers F. Truett, appellants, *vs.* The United States. Filed October 10th, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 112.

MARY E. H. GWIN AND MYRA F. TRUSTE,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLANTS.

BOYD & ATFIELD,
JAMES T. BOYD,
GEORGE A. KING,
FRANKLIN A. GANKIN,
of Counsel.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Appellees,

vs.

VICENTE PERALTA and Others.
MARY E. H. GWIN and MIERS F. TRUETT,
Intervenors,
Appellants.

Brief on the Part of Appellants.

This is a direct appeal to this Court from an order of the District Court of the United States for the Northern District of California, denying a motion for the execution of the final decree of confirmation in a California Private Land case.

The motion was founded on the matters set up in a verified petition or affidavit of appellants.

Record, page 1, fol. 1.

This is the second appeal to this Court in this case. This Court settled the title to the land claimed, on the former appeal, at December Term of the year 1856. The present appeal is rendered necessary by the refusal of the District Court to obey the mandate of this Court then issued.

19 How. 343, 349.

The grant under which the claim of title was asserted in this case was a grant of the Rancho of San Antonio. It was made in 1820 by Sola, the last Spanish governor of California, to Luis Peralta.

It is one of the oldest land grants in California, and was accompanied with *livery of seisin*.

The case in which the decree of confirmation was entered originated in a petition to the Board of Land Commissioners created under the act of Congress of March 3d, 1851.

Luis Peralta was the owner and in possession of the rancho at the time when the treaty of Guadalupe Hidalgo was entered into, and died seised and possessed of the lands of said rancho

in the year 1851, leaving a will whereby he devised the same rancho to his four sons—Domingo, Vicente, Antonio, and Ygnacio.

January 21, 1852, the four sons presented to the board a petition for the confirmation of their claim to the rancho under the grant and devise.

Record, page 4, fol. 8.

This case is No. 4 of the Commission—No. 100 in the District Court.

Appendix to Hoffman's Reports.

The board made an order in August, 1852, permitting Antonio and Ygnacio on their application to each file a separate petition for a portion of the grant.

Record, page 5, fol. 11.

This order was based on a stipulation of certain attorneys; was inartificially drawn, and made no provision for a separate claim by Domingo or Vicente, and no separate claim was presented by them or either of them.

Domingo and Vicente rested their claims on the petition filed January 21, 1852, in case No. 4.

The United States took issue under it, denying the validity of the grant and claim, and asserting title in herself under the treaty in the lands claimed.

The board examined the title under the claim made in the petition and that asserted by the United States; and decided that the grant was valid and vested in Peralta a present and immediate interest, that the United States took no interest therein under the treaty, and that the lands passed to the four sons under the will of Peralta.

Record, page 6, fol. 12.

After the petition was passed upon by the board, the right of either party to institute a suit in the District Court for the determination of their respective claims became a vested right.

U. S. vs. Ritchie, 17 How. 533.
Le Roy vs. Wright, 4 Sawy. 533

This right was exercised by the United States, and resulted in a decree adversely to her.

Record, page 6, fol. 12.

The right of either party to appeal to this Court from the decree of the District Court was a vested right.

U. S. vs. Adams, 6 Wall. 107.
Thompson vs. Los Angeles, Oct. Term, 1900.

This right was exercised by the United States, and resulted in a decree against her, and in favor of the claimants.

Record, page 7, fol. 15.
Record, page 56, fol. 104.

This Court in its opinion held that the northern line of the grant ran along the *north* instead of the *south* side of the Cerritos, as held by the District Court; and sent its mandate to that Court to conform its decree to the opinion and execute it.

U. S. vs. Peralta, 19 How. 343, 349.

The District Court thereupon made its decree on November 30, 1859 (filed December 1, 1859), correcting the decree of 1855 as to the northern boundary, by running that course along the northern, instead of the southern base of the Cerritos.

Record, page 7, fol. 17, 18.

This decree was never appealed from, annulled, reversed, or set aside, and is still of force, and unexecuted.

This decree confirmed the claim of Vicente, Antonio, Ygnacio and Domingo Peralta, *as tenants in common*, to the whole of the rancho *as of the 21st day of January, 1852*, when their petition was presented to the board.

Beard vs. Federy, 3 Wall. 491.
U. S. vs. Peralta, 19 How. 344.

It only remained for the Executive Department to give effect to the results of their labors.

Congress had declared that this should be the end of the litigation; that the decree should be conclusive between the United States and claimants.

Mott v. Smith, 16 Cal. 533, 551.

Here is *res adjudicata* in its broadest sense, not only because it was the decree of this Court but because Congress had also given to it that definitive character by express enactment in section 15 of the act.

Lynch vs. Bernal, 9 Wall. 322.

Under the provisions of the act of 1851, nothing now re-

mained to be done but for the surveyor general to survey the grant, and for the land office to make a patent for it.

9 Stat. at Large, page 633, sec. 13.

No provision was made in the acts of 1851, 1860 or 1864 for *compulsory survey of private land claims.*

Frasher vs. O'Connor, 115 U. S. 107.

This omission embarrassed the Government in the disposition of the public domain, and occasioned great discontent in California.

It occurred, however, in 1866 to legislators, that *the United States had power to survey the public domain,* and the act of that year enabled her to outwit the dilatory grantees of Spain and Mexico.

14 Stat. at Large, sec. 8, p. 220.

The confirmees were allowed by that act a limited time after confirmation to have their claims surveyed. Failing in this the surveyor was required to cause the lines of the public surveys to be extended over the granted lands, *setting off in full satisfaction of the grant,* and according to the lines of the public surveys, the land confirmed.

No survey of this claim was requested by the confirmees or by the United States, and no survey of it was made prior to the passage of the act, nor within ten months after its passage.

Record, page 25, fol. 52.
Record, page 28, fol. 52g.
Record, page 29, fol. 52h.

See instructions which the learned Commissioner Wilson issued to the surveyor, upon the passage of this act.

No. 132. Instructions relative to private land claims.

Zabriskie's Land Laws, page 606.

In the year 1895, the surveyor general, under the authority conferred and duty devolved upon him by that act, "*caused the lines of the public surveys to be extended over*" the lands of the grant, *and set off in full satisfaction of the grant* and according to the lines of the public surveys, the quantity of land confirmed in the final decree, *and as nearly as could be done in accordance with the decree.*"

This is the act and these the instructions under which the plat of survey of 1895 had its origin. Under its provisions the public domain was surveyed to the exterior lines of the

grant, *and the private claimant was compelled, in consequence of his neglect to request a survey, to take what was left in satisfaction of his claim.*

The delay of the surveyor in proceeding under this act cannot be imputed to the claimants.

This survey was authorized by Congress. The plat of survey was approved and certified by the surveyor general; is the only survey of the grant ever made by him, included all the granted lands; *became final, without the approval of the Land Department;* and was accepted by the confirmees.

Frasher vs. O'Connor, 115 U. S. 117.
McCreery vs. Haskell, 119 U. S. 333.
Durand vs. Martin, 120 U. S. 369.

It is compulsory on the confirmees; *they can have no other land than was thus lawfully set off to them; and that land they are entitled to.*

Botiller vs. Dominguez, 130 U. S. 242.

The surveyor thereupon prepared *a plat of survey of the lands of the rancho,* approved and certified it, and delivered it to one of the intervenors; by whom it was *presented to the general land office,* with a duly certified copy of the decree of confirmation, with a demand that a patent be made to the confirmees. This demand was refused; has ever since been refused; and no patent has ever been made for the grant. The plat is now on file in the department.

Record, page 28, fol. 52g.

A photographic copy of said plat of survey is annexed hereto, marked Exhibit "A."

When the general land office asserted that the survey of 1895 was the *only survey of the grant which had ever been made or filed,* it necessarily followed that the land so surveyed was the land which was granted—and that the confirmees were entitled to patent therefor.

Record, page 28, fol. 52g.
Smith vs. Reynolds, 9 App. Cas. D. C. 287.

Examination of this plat of this survey will show that it was made in exact conformity with the decree.

Certain persons claiming under the confirmees were by order of the District Court admitted to intervene in this case for the protection of their interests, and thereupon a motion was made by Mrs. Mary E. H. Gwin, that the decree be executed.

Record, page 24, fol. 50½.
Record, page 35, fol. 64.

The motion was made upon a verified petition or affidavit setting forth the facts concerning the claim, and action of the federal tribunals to the entry of the decree; averring that the decree of 1859 was a final confirmation of the title of the claimants; her rights as their successor in interest; that it remained unexecuted, and prayed execution.

The motion was denied without prejudice.

Record, page 52, fol. 97.
Record, page 34, fol. 62.

The Court below held on this motion, and based its denial on the propositions that the decree of confirmation of 1855, as amended in 1859, *was not a final decree;* that subsequently to 1859 this decree had been reversed, and set aside by the District Court. That the District Court had substituted another and different decree for that decree, which it designates as the decree of 1871; and had executed the latter decree.

Record, page 43, fol. 80.

Thereafter the appellants filed a new petition or affidavit, and renewed on their behalf the said motion; in which petition was set forth specifically the facts concerning the title which had resulted in the decree of 1859; and also action of the Court had subsequently to the entry of that decree.

Record, page 1, fol. 1.

The record shows that all the proceedings had in the District Court subsequent to the decree of 1859 were had in excess of the jurisdiction of the Court.

This motion was also denied, and the denial was put upon the same grounds.

Record, page 34, fol. 62.

The present appeal was perfected from the order denying this motion.

Record, page 53, fol. 100.

The claim of title set up in the petition was founded on the grant, possession under it, and the devise. The claim asserted by the United States was title to the same property under the treaty with Mexico.

A cursory examination of the opinion of this Court, on the former appeal shows that the matters considered were the

validity of this grant, the claim or title made in the petition, and the fact of the delivery of juridical possession of the granted lands.

As to the validity of the grant, and the claim of title this Court held:

"That the claim presented in the petition filed in this case, for the place called San Antonio, is valid to the whole extent of its bounds."

On the question of seisin, it considered these matters, viz.: What are the exterior bounds of the land whereof livery was made? Was the northern boundary San Antonio Creek or the creek at the base of the Cerritos of San Antonio? Was the western boundary the bay of San Francisco? Was the eastern boundary the crest of the Sierra? Was the southern boundary San Leandro Creek? And this Court held that the boundaries were those described in the Report of Martinez, and crystalized in the decree of the District Court.

U. S. vs. Peralta, 27 Fed. Cases, 499.
U. S. vs. Peralta, 19 How. 343.
U. S. vs. Pico, 5 Wall. 536.

When this Court affirmed the decree of the Court below, there can be no uncertainty in respect of the matter affirmed; this Court would not assume jurisdiction to partition lands between citizens of the State or to affirm such action by the Court below. It affirmed the grant to Luis Peralta, and the claim asserted under it, *in the petition*, and did not consider or pass upon any supposed claim not presented in the petition before it.

The claim made in the petition even with the names of Antonio and Ygnacio stricken from it, was claim to the Rancho of San Antonio as a whole.

This is the decree which appellants contend has never been executed, and of which it is the object of this motion to obtain execution.

Had the District Court granted the motion of appellants, and directed the United States to obey the mandate of this Court, and had the United States appealed therefrom, what persuasive argument would have been urged to this Court by the Department of Justice to secure a reversal of the order?

Antonio Peralta had, on the 18th day of June, 1852, presented his petition to the board (No. 273) for a portion of the rancho, claiming sole title thereto under the grant and the devise; and on the same day Ygnacio Peralta presented his peti-

tion (No. 274) for another portion of the said rancho, asserting sole title thereto under said grant and said devise.

Record, page 27, fol. 52d, 52f.

The case of Antonio became No. 98 in the District Court and that of Ygnacio No. 99.

Appendix to Hoffman's Reports.

Proceedings in each of these cases were separate and were also distinct from the proceedings in Case No. 4 of the Land Commission (No. 100 in the District Court), *the case at bar.*

Thurn vs. U. S., Hoffman, 298.

The proceedings in cases 98 and 99 resulted in decrees in each case adversely to the United States and in favor of the respective petitioners, for a several portion of the grant.

Record, page 28, fol. 52f.

The question of real estate law presented in this case is one which addresses itself to the student in a law office on the threshhold of his studies. It is a question of *priority of title from priority of right.*

He is early confronted with the maxim, "Qui prior est tempore, potior est jure," and early learns its application.

We have shown that the contest under the pleadings in this case was, which of two conveyances passed the title to the Rancho of San Antonio.

The conveyance to Luis Peralta was made in 1820. The conveyance to the United States was made in 1848.

If title passed by the conveyance to Peralta, there was no title left in the Government of Mexico to feed her conveyance by the treaty.

The question which conveyance was operative to pass the title was presented by the pleadings in this case, and was directly adjudged by the decree of this Court.

That decree not only affirmed the validity of the grant, and of the claim of title under the grant, but determined that the United States acquired no title to the granted premises under the treaty.

This decree is the law of this case. By force of it, the United States and her privies were and are estopped from asserting title to the granted premises or any part thereof.

Not only was the question of title adjudicated by this Court, but the question of boundaries of the granted lands was also put in issue and determined by the same decree, and the estoppel extended to that matter also.

The District Court in its action under the mandate of this Court, chose to treat the question as an open one, and it is this error of that court, which has brought before this court for consideration what was determined on the former hearing.

It is now claimed on behalf of the United States that surveys by her ministerial officers under these several decrees have successfully mapped the grantee of Spain and his assigns out of their property. It is no longer a question of title, but what property passed under the grant. Whether it was the property described in the decree of this Court or only the property described in several patents made by ministerial officers of the United States in accordance with the erroneous views of the District Court, and their own erroneous views also, of the proper construction of the decree of this Court.

The act of 1851 contemplated but *one survey* of a California Land Grant, and *one patent* for the granted lands.

Fremont vs. U. S., 17 How. 542, 565.
U. S. vs. Covillaud, 1 Black, 341.
U. S. vs. Grimes, 2 Black, 610.
Pico vs. U. S., 5 Wall. 536.
Hayner vs. Stanly, 8 Sawy. 214, 220.

In section 13, provision is made for a contest *in the local courts, of the right to the patent.* Pending which contest the District Court might enjoin its issuance.

This right of contest was exclusive. It was not conferred on the parties. As to them the matter was *res adjudicata.* They had their day in court. Their rights had been determined. The United States was the defeated party. She had no interest in any such contest.

The federal tribunals were required to be satisfied in the first instance with the *prima facie* right asserted and shown by claimants.

The object of the contest was to ascertain who was the actual successor in interest of the grantee of Spain or Mexico, and entitled to the patent.

U. S. vs. Sanchez, 27 Fed. Cas. 946 (No. 16,217).

There was no such contest in this case, no injunction, no bar to the issuance of the patent provided for in the act, as the sequence to the action of the Courts upon the claim presented and confirmed.

The rights of the respective parties under the act of 1851 were founded on contract.

Foster vs. Neilson, 2 Pet. 314
U. S. vs. Flint, 4 Sawy. 67.

Mexico ceded by treaty to the United States a vast territory for a valuable consideration.

The treaty provided that the inhabitants should enjoy with respect to their property "guarantees equally ample as if the same belonged to citizens of the United States," and be "maintained and protected in the free enjoyment of their liberty and property."

The Fossat Case, 2 Wall. 649, 703.

This act prescribed how the treaty should be executed, and when and upon what conditions the obligation of protection would be afforded, and it became a rule for the Courts.

U. S. vs. Flint, 4 Sawy. 48, 66.
Senator Crittenden, Cong. Globe, May 8, 1860, page 1961.
Altrazaran vs. Santa Rita, 148 U. S. 80.

The judiciary cannot depart from the method prescribed by Congress.

U. S. vs. Knight, 1 Black, 489.
U. S. vs. Nourse, 6 Pet. 470, 493.
Ely vs. U. S., 171 U. S. 223.
Bailey on Jurisdiction, sec. 22.

The act of 1851 was not merely a Code of Procedure. It was the method devised by Congress for performance of political obligations of the Government under the treaty.

It was an offer by the United States to each grantee under Spain or Mexico that if he would present his claim to the tribunals named in the act within the time limited, and prosecute the same successfully, he should *thereby* secure to himself the protection guaranteed by the treaty, and *forever* preserve his property rights.

The claimants did not come into court in this case voluntarily. They were forced to come under pain of forfeiture of their property.

9 U. S. Stat. at Large, sec. 8, 13.
U. S. vs. Flint, 4 Sawy. 50, 66.
Botiller vs. Dominguez, 130 U. S. 242.

The petition filed in this case was an acceptance by the petitioners of the offer so made; the rights of the parties were thereby fixed, and the act thereafter constituted a contract between the petitioners and the United States, which neither could change without the consent of the other.

Hancock vs. Walsh, 3 Woods, 351.
Reichart vs. Felps, 6 Wall. 165.
U. S. vs. Circuit Judges, 3 Id. 681.
U. S. vs. Flint, 4 Sawy. 66, 70.
Chicago vs. U. S., 104 U. S. 680, 685.

When the United States forced the claimants into the attitude of litigants with her, she abandoned her character of sovereign, and assumed the status of a *private litigant.*

U. S. vs. Aredondo, 6 Pet. 711.
U. S. vs. Flint, 4 Sawy. 58.
U. S. vs. Hancock, 12 Sawy. 394.

There is no reservation in the act of a right to submit these matters to any tribunal other than those named; or in any form except as therein prescribed, and no rule laid down in the act for the guidance of any other tribunal, in their determination.

U. S. vs. Hancock, 12 Sawy. 381, 394.

The jurisdiction of this Court did not exist in these cases by reason of its relation to the District Court, as a superior tribunal. Congress might have acted directly on the claims or have made the action of the board or of the District Court final; but jurisdiction to pass upon those titles, and the questions arising thereon, was expressly *created* and conferred upon the District Court and this Court in the manner prescribed in the act of Congress.

Grisar vs. McDowell, 6 Wall. 379.

The act was no less a contract because of its being an offer and acceptance, than if its provisions had been incorporated in the treaty.

Mexico might have insisted that each and all of the provisions of the act should be so incorporated, but she placed her reliance upon the plighted faith of the United States.

The Fossat Case, 2 Wall. 703.

The question submitted to the commission and the Courts by the act of 1851 was not within the ordinary cognizance of a court of law or a court of equity.

U. S. vs. Flint, 4 Sawy. 46.

Mr. Justice Field, commenting on this act, says, in the Flint case at page 50:

"We have principles prescribed for the Government of both

commission and Court in these cases, *and of the Supreme Court upon appeal from their decisions, not* applicable in ordinary proceedings, either at law or in equity."

Judge Hoffman said at page 67:

"Such were the means adopted by the political department of the Government to enable it to discharge its treaty obligations with intelligence and justice. It in effect called to its assistance the courts *and for that purpose invested them with a jurisdiction in all respects special and extraordinary, and which, except for the act, they would not have possessed.*"

He adds: "The ordinary Courts must be without jurisdiction when the political power has confided the whole subject to *special tribunals,* whose final decrees it has declared shall be conclusive."

This Court said in 21 Howard, 450: "In the exercise of the jurisdiction conferred by this act, and acts of a similar character, this Court has habitually revised decrees of the District Court, which were not final decrees under the Judiciary Act of 1789. The Court has uniformly accepted in the first instance, *as a final decree,* one that ascertained the authenticity of the claimant's title, and declared in general terms its operation, leaving the question of boundary and location to be settled subsequently. * * * The peculiar nature of these cases rendered such a relaxation of the rules of proceeding of this Court appropriate. The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their Executive Government to comply with that obligation. There was no occasion for the strict rules of proceeding that experience has suggested to secure a speedy and exact administration between suitors of a different character."

U. S. vs. Rico, 27 Fed. Cas. 806, 807.

The object of the act of 1851 could not be attained by simply declaring a title to be valid.

The confirmee was to be invested with the indicia of ownership and possession of his property, and to this end it was necessary that the boundaries of the property granted should be accurately determined. That was expressly provided for in the act.

It was so held in U. S. vs. Fossatt, 21 How., at page 451.

See, also:

Wayman vs. Southard, 10 Wheat. 4.
Stewart vs. Solomon, 97 U. S. 362.

Humphrey vs. Baker, 103 Id. 736.
Gordon vs. U. S., 117 Id. 702.
Re Sanford Fork & Tool Co., 160 Id. 255.
Central Nat. Bank vs. Stevens, 169 Id. 464.
Thompson vs. Los Angeles, Oct. Term, 1900.

In discussing the questions presented, it must be borne in mind that in dealing with a *confirmed claim* Congress and the Courts are not dealing with property of the United States, but with private property of the citizen.

Calder vs. Bull, 3 Dall. 386, 394.
Thurn vs. U. S., Hoffman, 298.
U. S. vs. Conway, 175 U. S. 69.

Congress may prescribe rules and regulations for the disposition of the public domain.

Irvine vs. Marshall, 20 How. 558.

With respect to the right of the citizen to property, its legislation may provide the means, under the treaty, for their ascertainment and settlement between him and the United States; but beyond that, it cannot go. When the right is determined, that right becomes personal to the citizen of the State; antedates the treaty; and the judgment of the Court brings it within the protecting aegis of the Constitution of the United States and of the State of California.

Hornsby vs. U. S., 10 Wall. 241.

Federal legislation and the federal judiciary have no concern with private property after it has been determined by the means prescribed, to be private property. Hence, rules and regulations concerning the *public domain* can have no application to the property of the citizen. Federal power cannot *regulate* him out of it.

Andrews Amer. Law, sec. 127.
Martin vs. U. S., Hoff., 146.
Cal. Powder Works vs. Davis, 151 U. S. 390, 394.
Potter vs. Randolph, 58 Pac. Rep. 905.

There is no proceeding under Mexican laws whereby the title granted to Luis Peralta could be divested, except by denouncement and judgment of forfeiture.

Fremont vs. U. S., 17 How. 542, 557, 560.
U. S. vs. Vaca, 18 How. 556.
U. S. vs. Sutter, 21 Id. 178.
Hornsby vs. U. S., 10 Wall. 238.

There is no proceeding under the constitution and laws of California whereby the title vested in Luis Peralta, and his assigns could be divested except by their voluntary conveyance, by succession or by condemnation under the law of eminent domain.

There is no provision in the Act of 1851 for forfeiture of the title vested in Luis Peralta at the date of the treaty, except for failure to present the claim of title to the federal tribunals.

U. S. vs. Sutter, 21 How. 170, 178.
U. S. vs. Flint, 4 Sawy. 69.
The La Ninfa, 75 Fed. 518.

When this Court has examined the title to real property; has adjudged the asserted claim of title under a grant from Spain or Mexico to be valid; and that it was made before the deed of Mexico to the United States; the validity of the grant and of the claim of title is no longer open to question. The decree has become the law of the case.

From assaults upon it by the Court below, or by the Department of Justice, this judgment needs no protection at the hands of counsel for appellants.

The matters left open for discussion, are, Has the decree been executed? Has the matter relied upon as execution of the decree really executed it? Has the confirmee received the fruits of his judgment?

Fremont vs. U. S., 17 How. 557.
U. S. vs. Conway, 175 U. S. 69.

The denial of this motion and the reasons given therefor by the District Court naturally suggest that something done by that tribunal subsequently to the entry of the decree has either executed the decree or furnished it reason for refusing to execute it.

We will now proceed to consider what was done by the Court below; whether it had jurisdiction to do what was done; and what was the effect of its action upon the rights of the appellants.

The learned Judge of the Southern District of California presided over the District Court of the Northern District in 1855 in the absence from the State of the Hon. Ogden Hoffman, Judge of the Northern District.

Judge Ogier did not perceive that the Court had reached the limits of federal jurisdiction in affirming the validity and extent of the claim made and of the right asserted in the petition.

99 Fed. Rep. 624.
Castro vs. Hendricks, 23 How. 441.
Grisar vs. McDowell, 6 Wall. 379.
U. S. vs. Halleck, 1 Id. 455.
U. S. vs. Fossat, 20 How. 424.
U. S. vs. Grimes, 2 Black, 610.

He assumed jurisdiction to turn the case made in a suit to settle title into a suit *for partition of the rancho*, between some of the claimants; thus inventing an issue not presented by the pleadings.

The District Court proceeded by its said decree to ascertain and determine *that on the 26th of January, 1855*, Domingo and Vicente Peralta and their assigns, had become the owners together in severalty to the exclusion of Antonio and Ygnacio, of the whole of the northern portion of the grant; specifically describing such portion as it is described in 19 Howard, page 344.

Record, page 7, fol. 14.

All the proceedings had by the District Court *in this case*, as shown by the records, subsequent to the entry of the decree of November 30, 1859, were had in relation to alleged surveys of the said northern *portion* of the grant *only*.

Did the District Court have jurisdiction to pronounce this portion of the decree?

There was nothing in the petition or the proceedings for confirmation looking to a *partition* of the rancho. There is nothing in the act of 1851 which would sustain any such action of the Court.

Putnam vs. U. S., 20 Fed. Cas. 90.
Philips vs. Mound City, 125 U. S. 610.
1 Bailey on Jurisdiction, sec. 22.
12 Encyclop. of Pleading and Practice, page 125.
U. S. vs. Grimes, 2 Black, 610.

No motion was made in the District Court to amend or change the petition in any respect, nor was it amended or changed. Nor was any separate petition filed by Domingo or Vicente.

Le Roy vs. Wright, 4 Sawy. 533.

The District Court thus sought by a further decree to *change the tenure of the claimants* as tenants in common, as it existed in January, 1852, in the whole rancho, into an estate in common in severalty of those two of them, in a portion of the grant, several years afterwards. This was attempted to be done long af-

ter Vicente, as shown by the record, had ceased to have any interest in the property to be affected by the decree.

Record, page 9, fol. 22.

As to any matter adjudged, except the validity of the claim, the decree spoke as of the date of its entry in 1855.

Lynch vs. Bernal, 9 Wall. 325.

These decrees are inconsistent. The tenure declared in the one, is different from that declared in the other.

Partition of lands in California held in private ownership is a matter which concerns the private owners; over which, and over whom, the Federal Courts had no jurisdiction.

Putnam vs. United States, 20 Fed. Cas. 90.
Green vs. Van Buskirk, 5 Wall. 312.
Brown vs. Brackett, 21 Wall. 387.
Martin vs. U. S., Hoffman, 146.

The establishment by the decree of 1859 of the *exterior boundary lines of the grant* built upon those lines a Chinese wall of exclusion, within which the federal Government could not enter, except for the purpose of locating those exterior lines.

Cooley Cons. Lim. (5th ed.), 30, 365, note 4.
U. S. vs. Grimes, 2 Black, 612.
U. S. vs. Morillo, 1 Wall. 709.
U. S. vs. Hancock, 133 U. S. 196.

The western boundary of the grant being the bay of San Francisco, neither the United States nor the State of California or her assigns, could assert title under the laws of California to lands, wet or dry, inside of that boundary, not derived from the grantee of Mexico.

Knight vs. United Land Association, 142 U. S. 186.
Tripp vs. Spring, Fed. Cas. No. 14,180 (5 Sawy. 211, 216.)
Cal. Powder Works vs. Davis, 151 U. S. 394.
Lowndes vs. Huntington, 153 Id. 22.
Carpentier vs. Montgomery, 13 Wall. 492, 493.
McFadden vs. Robinson, 22 Fed. 10.
Romie vs. Casanova, 91 U. S. 379.

Jurisdiction of the federal tribunals was limited to the ascertainment and determination of what Spain or Mexico had done with *her* lands. It could not determine what Luis Per-

alta had done with *his*. Of this subject and of the parties, the State judiciary alone had jurisdiction.

U. S. vs. Ritchie, 17 How. 541.
Castro vs. Hendricks, 23 Id. 442.

"The people of the State are supreme in their authority over all subjects of Government within the boundaries of the State, which are not delegated to the United States Government."

Andrews' American Law, sec. 158.
Wilcox vs. Jackson, 13 Pet. 498, 517.
Irvine vs. Marshall, 20 How. 569.

"The right and jurisdiction to determine finally all controversies between her citizens and all conflicting claims to property within her limits, is an essential element of sovereignty, which was possessed by each State before the adoption of the Federal Constitution, and this right was not surrendered by that compact."

The constitution and laws of California governed the acquisition, enjoyment, and disposition of property within her borders under the will of Luis Peralta, and determined the nature of the estate acquired by his devisees or heirs.

U. S. vs. Fox, 94 U. S. 320.
DeVaughn vs. Hutchinson, 165 U. S. 559.
Ely vs. United States, 171 U. S. 223, 239.
Brine vs. Insurance Co., 96 U. S. 636.
U. S. vs. Jonah Crosby, 2 Condensed Rep. 437 (7 Cranch).

Partition of lands by her own judiciary was provided for by law, by the State of California. Jurisdiction of the proceeding was conferred upon her own Courts.

Statutes of California, 1851, page 93.

No such partition, therefore, could be made of it without the presence, the assent or opportunity to be heard of all the parties interested in the land, and in a forum having jurisdiction both of the action and the parties.

Sutter vs. San Francisco, 36 Cal. 112.
Mulligan vs. Smith, 59 Id. 230.
Windsor vs. McVeigh, 93 U. S. 274.

Consent could not confer jurisdiction.

U. S. vs. Pico, 5 Wall. 539.
The Lucy, 8 Id. 309.
12 Encylop. of Pleading and Practice, p. 125.

The averments of the petition or affidavit on this motion were, that the decree of 1855 as amended in 1859 was a final decree of confirmation; that the validity of the grant and claim of title had thereby been affirmed by this Court; that the land had been surveyed by the United States; that the decree had not been executed; that ownership and possession of such land by definite boundaries had not been secured to the confirmees; and that this could only be done by patent in conformity with this decree.

These averments were admitted by the demurrer, but it was urged on behalf of the United States that some other decrees had been substituted for the said decree, and such other decrees executed; and that the District Court thereby lost all power to execute the original decree.

Whatever power the District Court may have lost, the power of this Court to compel obedience to its mandate does not admit of question.

Ex parte Union Steamboat Co., 178 U. S. 317.

It is true that its mandate is not self-executing. That it is addressed to the lower Court, and not to the Judge of that Court; and is transmitted to the Clerk to be filed.

No provision is made in it, or by law, for notice to the parties or to the Judge of the lower Court, of its existence.

The motion for execution in this case was notice to the Court below of the exigency of the mandate; of its duty to obey it; of its nonexecution, and of the right of appellants to demand execution.

The United States has no standing in court to resist the execution of the mandate of this Court. Her interest in the title ceased with the passing of the decree of 1859. She did not appeal from it. It became final by operation of law.

Martin vs. U. S., Hoffman 147.
Martin vs. Hunter, 1 Wheat. 304, 355.
U. S. vs. Fossat, 21 How. 449.

The gist of the whole matter is the command of this Court, and alleged disobedience by the Court below.

The form of proceeding by which the attention of this Court is called to the matter, would seem to involve nothing more than a question of practice.

Perkins vs. Fournequet, 14 How. 330.
City Nat. Bank vs. Hunter, 152 U. S. 515.
Ex parte Union Steamboat Co., 178 Id. 317.

There were no persons claiming adversely under Spain or Mexico by superior title, lands of the rancho. If there had been, they could not contest in the federal tribunals, the right of the confirmees to their patent. The patent that was to be made was a patent for the lands granted—the lands granted to Luis Peralta.

Any such adverse claimants would have to present their claims to the board in like manner, and with like results of affirmation or rejection, and get their independent patents. The State judiciary would have had jurisdiction over rights thus established, and of judicial contests respecting them, subject to supervision by this Court in cases where its jurisdiction could be invoked.

U. S. vs. Sanchez, 27 Fed. Cas. 948.
U. S. vs. White, 23 How. 253.
White vs. U. S., 1 Black, 502.
U. S. vs. Grimes, 2 Black, 612.
Thurn vs. U. S., Hoffman, 298.

The claim of title being determined, the ordinary courts of the country were then open to the patentees, to have adjudged which patentee had the better right to the lands.

Ibid.
McFadden vs. Robinson, 22 Fed. 10.
Cal. Powder Works vs. Davis, 151 U. S. 390, 394.
Crystal Springs vs. City of Los Angeles, 82 Fed. 114.

The jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.

An execution is the end of the law. It gives the successful party the fruits of his judgment.

Wayman vs. Southard, 10 Wheat. 5.
U. S. vs. Peters, 5 Cranch, 141.
Gordon vs. U. S., 117 U. S. 702.
Ex parte Flippin, 94 U. S. 350.
U. S. vs. Black, 128 U. S. 48, 52.
Windom vs. Redfield, 19 D. C. 60, 137 U. S. 636.
Gaines vs. Rugg, 148 U. S. 228.
Central Nat. Bank vs. Stevens, 169 U. S. 464.
The Fossat Case, 2 Wall. 712.

The power of the District Court over the cause, under the acts of Congress, does not terminate *until the issue of a patent conformably to the decree.*

U. S. vs. Fossatt, 21 How. 450.

The learned District Court bases its contention that the decrees of 1871 are the final decrees in this case upon the proposition that the act of 1860 conferred power on that Court to reverse, annul, and set aside its decree, in considering a question of survey.

That this could be done at the instance of a stranger to the title and to the proceeding—in a new case and between new parties.

The decree had affirmed the validity of the grant and defined its boundaries as a part of the original adjudication. Hence the only persons interested in the surveys of the claim confirmed were the confirmees and the United States. But the surveys considered by the Court were not surveys of the claim. They were surveys of the farms of Vicente and Antonio *within the exterior boundaries of the grant;* which *grant* was owned, as its decree and the decree of this Court showed, wholly by *Peralta and his assigns.* The District Court, in acting upon this survey confronted by this decree necessarily held that *Carpentier et al. who did not claim under Peralta, were the owners of Peralta's land,* by title derived from the United States.

The decrees of 1871 are based upon this proposition.

But the act of 1860 had no application to *strangers to the title.* The interested party contemplated by the act is one "who has such an interest in the survey and location of a land claim, as to make it just and proper, that he should be allowed to intervene for his interest therein."

Dehon vs. Bernal, 3 Wall. 774.

The learned District Court erred in holding that the act of 1860 applied to the Peralta case.

If the act of 1851 was a contract; if the decree of this Court was determinative of the rights of the parties; how could Congress impose new and onerous conditions upon them, or either of them, by the act of 1860? How could Congress invest another tribunal with power to undo what had been done so many years before by this Court?

Reichart vs. Felps, 6 Wall. 160, 165.
U. S. vs. Flint, 4 Sawy. 42, 67, 70.

Congress could prescribe by the act of 1860 how the right reserved by Mexico and succeeded to by the United States of locating unlocated grants should be exercised.

The grant to Luis Peralta had been located by the former Government.

U. S. vs. Sepulveda, 1 Wall. 104, 108.

The learned Judge of the District Court, in deciding this motion, announced as the doctrine of this Court that the patent issued upon a purported survey under a final decree in a California private land case is conclusive of the rights of a confirmee, saying: *"The patents as issued in effect decide that the lands described therein include all the lands to which the claimants were entitled under the decree and survey."*

Record, page 45, fol. 82.

He cites the case of Beard vs. Federy, 3 Wall. 473, as authority for this doctrine.

Record, page 51, fol. 96.

With all due deference to the Court below, we do not think that the cited case bears out this proposition.

Beard vs. Federy was an action of ejectment. The demanded premises were included in the decree, in the survey, and in the patent. The defendants claimed under a grant from Governor Pico, which included portion of the patented lands. This grant had never been presented to the Board of Commissioners, and had never been *located* by Mexico or by the United States.

The question considered was whether the patent under which plaintiff claimed was conclusive of plaintiff's right to recover as against defendant's unconfirmed unlocated grant.

This Court held that the patent is record evidence of the action of the Government upon the *title of the claimant;* that as between the parties to the action "the Government declares *that the claim asserted was valid under the laws of Mexico;* that it was entitled to recognition and protection by the stipulations of the treaty; and might have been located under the former Government, and is correctly located now so as to embrace the premises as they are surveyed and described *As against the Government this record, so long as it remains unvacated, is conclusive.* And it is equally conclusive against parties claiming under the Government by *title subsequent.*"

The proposition laid down by this Court was that *in this form of action* the patent was not subject to collateral attack by an adverse claimant who did not claim under a superior title.

Lynch vs. Bernal, 9 Wall. 315; Carpentier vs. Montgomery, 13 Wall. 481; Henshaw vs. Bissell, 18 Wall. 255; Miller vs. Dale, 92 U. S. 457; Van Reynegom vs. Bolton, 95 U. S. 33; Adam vs. Norris, 103 U. S. 591; Knight vs. United Land Association, 142 U. S. 161; DeGuyer vs. Banning, 167 U. S. 723; Beley vs. Naphtaly, 169 U. S. 353, were also actions of ejectment, in which it was held as in the Beard case, that the patent which

included the demanded premises was conclusive as between the parties to the action of the right of the patentee to recover in that form of action; and that they could not so recover lands *not* included in the patent, without having it reformed in a proper proceeding.

In the KNIGHT CASE plaintiff claimed title to the demanded premises under an alleged grant from the State. Defendants claimed under a patent from the United States upon a confirmed Mexican grant.

Plaintiff had judgment in the local California Court, which, on appeal to the State Supreme Court, was affirmed; and was brought here by writ of error.

This Court held that the demanded premises were included in the decree of confirmation; that the survey followed the decree; that the patent which recited decree and survey was not subject to collateral attack. That it was conclusive in this form of action against all *persons* not claiming under a superior title derived from Spain or Mexico. That the State of California, claiming under the United States, had no title to lands embraced in the decree against her, and could not be source of title thereto in the plaintiff.

Mr. Justice Field, in a concurring opinion, shows at page 205 that the Court below "stated that the question involved was whether the officers of the Land Department had power to patent land outside of the natural boundaries given in the decree of Confirmation," adding:

"In this statement the learned Court fell into an error. No such question was involved in the case. The approved survey upon which the patent was issued crossed the mouth of Mission Creek, and included the lands above its mouth, among them the premises in controversy. The question involved, therefore, was whether in an action of ejectment for the possession of those lands the plaintiff could collaterally assail the correctness of the official survey upon which the patent was issued, and establish another line as the true boundary, and then recover the lands on showing that they were outside of the new boundary thus established. I do not think that such a position was ever successfully asserted in any Court. If there was error in the survey embodied in the patent, it could not have been shown *in this action.*"

In discussing the Knight case, Mr. Justice Field says at page 212: "That the United States cannot convey by patent what it never owned, or has already parted with, no matter with what formality the instrument is issued; is a self evident proposition.

The Government in that respect is under the same limitations as an individual."

At page 209, the learned Justice quotes from Tripp vs. Spring, 5 Sawy. 215 (the defendant claimed title under the Pueblo grant; the plaintiff under the State of California).

In giving judgment for the defendant, he says:

"The decree confirming the claim of the city fixes the bay of San Francisco at ordinary high-water mark as its eastern boundary, and this line cannot be changed by the surveyor general or any department of Government. * * * Any patent of the United States which may hereafter be issued to the city from the land department can neither add to nor take from the title *already vested* in the city and those claiming under it."

By the act of 1851 Congress conferred upon the instrumentalities named jurisdiction to affirm or reject the claim of title to lands alleged to have been granted and located by Spain or Mexico, and if confirmed to convey the same to the grantees.

Higueras vs. U. S., 5 Wall. 827, 833.
Fremont vs. U. S., 17 How. 542, 565.
U. S. vs. Sepulveda, 1 Wall. 104, 107.
U. S. vs. Halleck, 1 Id. 439, 455.
U. S. vs. Billings, 2 Id. 444, 448.
U. S. vs. Armijo, 5 Id. 444, 449.
U. S. vs. Pico, 5 Id. 536, 539.
Alviso vs. U. S., 8 Id. 337.
Henshaw vs. Bissell, 18 Id. 255, 264.

The course of procedure was plain, simple, adequate, and symmetrical.

The board, aided by the Courts, was to ascertain and establish the boundaries of the *specific grant*, the surveyor was to plat the same, and the executive department to convey it by patent.

Where the former Government had not located the grant or claim, the board so aided was to determine its extent and the *out-boundaries*, and the executive, succeeding to the right of location which passed by the cession, was to locate and patent the claim.

Hornsby vs. U. S., 10 Wall. 224, 232.

If a patent is execution of a decree, which must control in the location of the property—the decree which ascertains and defines the boundaries, or the patent which is to interpret and give effect to the decree?

See the cases above cited.

In no case that has come under the observation of counsel has this Court held that a patent upon a private land claim which did not conform to the final decree of confirmation was conclusive upon the *confirmees*.

It remained for the District Court to discover that a ministerial officer, by a stroke of the pen, or the typewriter at his desk, could reverse the solemn decrees of that Court or perform the same kindly office for this Court. A power which neither of these Courts could exert after the passing of the term of entry.

We affirm that it is the doctrine of this Court that the decree of the Spanish or Mexican Government of juridical possession of the land estopped Spain and Mexico from claiming any interest in the granted premises before the cession, and that the same decrees and the decrees of the federal tribunals in like manner estopped the United States, after the cession.

U. S. vs. Sutherland, 19 How. 363, 365.
U. S. vs. Halleck, 1 Id. 439, 455.
Graham vs. U. S., 4 Id. 259.
U. S. vs. Pico, 5 Id. 536, 538.
Higueras vs. U. S., 5 Id. 827, 833, 834.
Van Reynegom vs. Bolton, 95 U. S. 33, 35.
Ainsa vs. U. S. 161 Id. 230.

The errors of the federal tribunals with which this case abounds, arose from failure to observe the distinction which exists in the character of grants of land in California, to which attention was called by Mr. Justice Clifford in Higueras' case, and subsequently by Mr. Justice Field. These grants were briefly classified by the latter learned Justice, in the cases of Alviso and Hornsby:

1st. Grants by specific boundaries where the donee was entitled to the entire tract. 2d. Grants by quantity, within larger out-boundaries, where the grantee was entitled only to the quantity specified; and 3d. Grants of a certain place or rancho, by some particular name either with or without specific boundaries where the donee was entitled to the tract according to the boundaries, if given, or if not given, according to the limits of the tract as shown by proof of settlement and possession.

The grant to Luis Peralta came within the first and third classes.

Higueras vs. U. S., 5 Wall. 833.
Alviso vs. U. S., 8 Id. 339.
Hornsby vs. U. S., 10 Id. 232.

Grants of the first and third class are defined to be *located* or *specific* grants.

Grants of the second class are denominated *floats*.

The rules of law applicable to a floating grant are inapplicable to the case of a *located grant*.

In both cases the *grant creates the title*. In the case of a *located grant* it creates title to the exact *thing granted*, and as of the date of the grant. The grantor had by his grant parted with the right and title to it absolutely, and invested the grantee with it. It was no longer property of the grantor.

Many grants in California of the former sovereignty were of a certain quantity of land to be carved out of a larger area. Mexico and her grantee thereby became *tenants in common* of the larger area with right of possession of the whole tract in her grantee; Mexico reserved the right to locate the float. Where this right had not been exercised prior to the cession, the United States succeeded to the Estate and the right. She anchored the float by survey, and located the grant by her patent.

Fremont vs. U. S., 17 How. 542, 557.
U. S. vs. Pacheco, 22 Id. 225.
U. S. vs. McLaughlin, 127 U. S. 428, 448.

Mr. Justice Clifford, in his dissenting opinion in the Fossat Case, said at page 726, where the grant is of a tract by specific boundaries: "It is incumbent upon the Court not only to determine the question of confirmation, but also, if it be decided to confirm the claim, to determine the boundaries of the grant as a part of the *original aljudication.*"

He calls attention to the distinction between specific grants and floats, saying: "In the case of a float, the location must be left to the Executive Department."

He says, also, that the provisions of the act of 1860 have nothing to do with the *decree* entered in 1858 nearly two years before the act was passed.

Appeals to this Court, in matters of survey of California land grants have been with but few exceptions, upon surveys of floating grants. These cases are reported in

Fremont vs. U. S., 17 How. 542.
U. S. vs. Fossat, 20 How. 413.
U. S. vs. Fossat, 21 Id. 445.
Rodriguez vs. U. S., 1 Wall. 582.
U. S. vs. Vallejo, Id. 658.
U. S. vs. Sutter, 2 Id. 562.
U. S. vs. Pacheco, 2 Id. 587.

The Fossat Case, 2 Id. 649.
Alviso vs. U. S., 8 Id. 337.
Hornsby vs. U. S., 10 Id. 224.

The bond which Shylock exacted of Antonio furnishes another instance of a floating grant.

"If you repay me not on such a day in such a place
Such sum or sums as are expressed in the condition;
Let the forfeit be nominated for an equal pound
Of your fair flesh to be cut off and taken
In what part of your body pleaseth me."

—Merchant of Venice.

But in this case the grant was to be located by the obligee, who, for reasons personal to himself, did not care to exercise the right.

The cases in which surveys of specific grants were considered are

U. S. vs. Halleck, 1 Wall. 439, 455.
U. S. vs. Estudillo, 1 Id. 710, 717.
U. S. vs. Billings, 2 Id. 444, 448.
Dehon vs. Bernal, 3 Id. 774.
Graham vs. U. S., 4 Id. 259.
Higueras vs. U. S., 5 Id. 827, 832, 833, 834, 838.
Knight vs. United Land Assn., 142 U. S. 161.

The case of U. S. vs. Hancock, 133 U. S. 193, was a suit to set aside a patent upon a specific grant for alleged fraud in the survey.

U. S. vs. Sepulveda, 1 Wall. 104, 108.

The District Court undertook in this case to revise a survey under a final decree of the board. This Court held that the Court had no jurisdiction over such surveys, saying "the act of 1860 creates a new jurisdiction in the Court which cannot be assumed independent of the act, and under it should be exercised only in cases coming clearly within its language."

The act of 1860 is limited to surveys made in compliance with the 13th Section of the act of 1851. Surveys of the grant.

12 Stat. at Large, p. 33.
U. S. vs. Rico, 27 Fed. Cas., p. 808.
U. S. vs. Armijo, 5 Wall. 444.

This was a case of apparently conflicting grants, where the patents made upon them did not conflict, and this Court held that the surveys were in accordance with the equitable rights of the patentees.

If the claim be to land with defined boundaries, or capable of identification, confirmation perfects the title to the particular tract, and a subsequent patent is only documentary *evidence of that title.* If the claim be to quantity, and not to a specific tract, confirmation will attach to the *land segregated by survey.*

U. S. vs. Sutherland, 19 How. 353.
Langdean vs. Hanes, 21 Wall. 521, 529.
Teschemacher vs. Thompson, 18 Cal. 11, 25.
Morrow vs. Whitney, 95 U. S. 551, 554.
Whitney vs. Morrow, 112 Id. 693.
Maxwell Land Grant Case, 121 Id. 325, 372.
See act of July 1, 1864, 13 Stat. at Large, sec. 7, page 334.

It was action of the District Court similar in The Fossat Case to that approved by the Court below in this case, which drew from Mr. Justice Nelson the indignant protest, at page 714 of the 2d Wallace.

Where survey is to be made of a tract of land with specific boundaries shown by natural monuments, the task of the surveyor is simple. He must fix the location of the monuments on the ground, and in platting must extend the lines between them. Courses and distances must both yield.

These monuments are unchangeable. They will always be found where nature placed them unless destroyed by some convulsion of nature.

Such are the monuments given in the decree in this case; their location was unmistakable. The duty of the surveyor was plain. He was powerless to change the monuments. No trick of survey could accomplish that. The grant was not *perfect,* because the location of the eastern boundary (the crest of the Sierra) was to be determined by survey on the ground; but when so ascertained the grant was a specific, located grant, in its entirety.

The Court declared in its decree, the location of all the lines, and the termini of the eastern line, so that it could be readily traced on the ground.

Carpentier vs. Montgomery, 13 Wall. 480, 490, 494.

This was the decree which was to be executed. This was the decree, of which survey was made in 1895.

It was the duty of the United States to survey and patent the confirmed claim. If it did not do so, if it surveyed and patented something else, it was the error of the United States; not of the patentee.

The Court had thus by the existence and potentiality of the

decree in favor of Domingo and Vicente enabled the Department to advise the United States that execution of this decree relieved it from obedience to the mandate of this Court.

We have endeavored to show to the Court that the object of the act of 1851 was to sever the private land claims from the public domain; that a decree which determined that certain land was granted and *located* by Spain or Mexico was final and conclusive between the United States and claimants; that the decree confirming the claim presented in the petition in this case for a *located grant* exhausted the jurisdiction conferred by the act, and is the law of the case, and left no question open but the location by survey on the ground, of the tract claimed and confirmed by the decree.

U. S. vs. Rico, 27 Fed. Cas. 807.

If we have not succeeded in convincing this Court that the only survey under the decree is the survey of 1895; that this survey has not been followed by patent; it becomes our duty to show that there has never been a survey or patent of the lands so assigned to Domingo and Vicente.

The decree in favor of Domingo and Vicente Peralta does not describe any portion as a grant or claim. It confirms to them the northern portion of the land of the rancho, referring to the grant lines for the exterior boundaries. To ascertain what land was intended to be conceded to them, the two decrees must be construed together, which will give us a description of the concession, as follows:

And it is hereby further adjudged, ordered, and decreed that there be confirmed to the said Domingo and Vicente Peralta, the northern portion of said land of San Antonio; having for its northern boundary a line commencing on the bay of San Francisco, at a point where there are close to the said bay the two cerritos as described in the first possession given by Martinez to Luis Peralta on the 16th of August, 1820; running from the said bay eastwardly along by the *(southern)* northern base of the cerritos of San Antonio up a ravine to the comb or crest of the Coast Range of mountains, or the Sierra; thence for the *(western)* eastern boundary, a line running along the comb of the said Sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco, and extending easterly to the said Sierra; on the south by the said line beginning at the crest or comb of the Sierra, and running westerly through a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in

sight of the public road; thence following the center line of the ravine and the creek or estuary of San Antonio to its mouth in the bay of San Francisco; being the line of division between this land and the land of Antonio Peralta; which line extends from the said bay to the most eastern boundary of the rancho of San Antonio, and on the west by the bay of San Francisco, which line along the bay constitutes its western boundary.

Or, the description of the portion so assigned to Domingo and Vicente Peralta might have been rendered thus:

The claim presented in the petition filed in this case, for the place called San Antonio is valid to the whole extent of its bounds, to wit:

Giving the external boundaries as they are set forth in the decree of 1855 as amended by the decree of 1859, adding:

And that there be confirmed to Domingo and Vicente Peralta the whole of the said rancho *excepting therefrom,* all that portion thereof which lies south of a line dividing the lands of Vicente from the lands of Antonio Peralta, which line is the line of division between this land and the land of Antonio Peralta, and which line extends from the bay of San Francisco to the comb or crest of the Sierra. This line of division between said Vicente and Antonio is further described as follows:

Commencing at a point in the western boundary of the rancho, where it is intersected by the northerly bank of San Antonio Creek, running thence southerly along the westerly line of the rancho to the middle of said creek; running thence in a general easterly direction following the thread or center line of the creek to the foot of a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, and thence following the said ravine easterly to the comb or crest of the Sierra.

Record, pages 27, 28, fol. 52 E.

These descriptions conform to those axiomatic propositions in applied mathematics:

I.

That the sum of all the parts of a thing is equal to the whole thereof.

II.

That where a tract of land is to be divided into two or more parts by right lines extending easterly from a westerly boundary, approximately parallel to each other, each parcel where there are two only, must have one coterminous boundary; where there are three parcels, two of them must have coterminous

boundaries with the third; where there are four parcels, two of them must each have coterminous boundaries with other two of them.

See Diagram, post, p. 46.

Having ascertained what the decree is, what is the land whereof confirmation was made to Domingo and Vicente Peralta, the question for consideration is whether this decree has been executed.

By referring to the record, it appears that in August, 1859, the United States, moved the District Court to order returned by the surveyor general a plat of survey of *part* of the Rancho of San Antonio, approved by him, in Case No. 4, and obtained an order to that effect; that a survey and plat of such portion of the grant was accordingly made, certified, and filed in Court.

Record, page 12, fol. 28.

That afterward the decree of the District Court having been amended as directed by the mandate of this Court, November 30, 1859, a further order was made remanding this plat with instructions to the Surveyor to conform it to the amended decree.

Record, page 15, fol. 34.

That on August 10, 1860, said surveyor returned into Court a new plat of survey of the said portion of the rancho which was approved by him March 3d, 1860; and this survey was considered by the Court.

Record, page 13, fol. 28.
Record, page 16, fol. 34.

H. W. Carpentier applied to the Court on behalf of himself and others for leave to contest, and was admitted to contest this survey under his alleged grant from the State of California.

Record, page 16, fol. 35.

They did not claim under Peralta, the owner of the property, but under the State. The State claimed title under the United States. This Court had determined the claim of the United States adversely. The United States was a stranger to the title.

The matter to be contested was the question of the location of the dividing line between the farms of Vicente and Antonio.

This was not a federal question. It was a matter of State judicial jurisdiction, in which those two were alone interested.

It was a matter of no more interest to the United States than

would be the location of the dividing lines between two lots in the city of Oakland or the city of New York.

Her tribunals could not locate or establish such a line.

There is probably no other man in the United States who ever stole a river, and who successfully concealed his crime and enjoyed the usufruct for nearly half a century. 1852-1901.

City of Oakland vs. Carpentier, 21 Cal. 642.
State of California vs. Southern Pac. Co., 157 U. S. 228.

In considering the survey the Court had no power to depart from the decree.

The decree of 1859 was the only guide to the surveyor and he must follow it in making the survey. The Court must be guided by the decree in passing upon the survey.

U. S. vs. Halleck, 1 Wall. 439, 455.
Supervisors vs. U. S., 4 Id. 435.
French vs. Edwards, 13 Id. 506.
Miller vs. Dale, 92 U. S. 477.
Gaines vs. Ruegg, 148 Id. 240.

The Court examined this survey and *rejected* it as not being in conformity with its decree.

See Exhibit "H."
Record, page 17, fol. 37.

The examination of the plat of this survey will show that it was made in exact conformity with the decree.

The District Court did not so construe its power. This is apparent from the language of its decree rejecting this survey which was entered November 22d, 1862, for while it directed the surveyor to adopt all the lines and courses numbered on the plat from 1 to 93 and 113 to 130, inclusive, he was directed to so modify the survey in a new survey as to conform it to the decree of November 22d, 1862, and to throw out from and discard all the lines and courses 93 to 113, inclusive (*which had been run in conformity with the decree of 1859*), and run all those lines and courses along the *inner line of the shore*, excluding therefrom and *from the lands confirmed* the waters of the bay of San Francisco and of *the arms thereof*, and the lands covered thereby, so far as the tides ordinarily flow at the full (and) change of the moon.

Record, page 17, fol. 37.

This change and modification of the survey as to the western and the southern lines of the said portion of the rancho was a

radical departure from those lines as they are described in the decree of 1859.

In giving direction for the new survey, the Court directed that the surveyor from line or course 93 to 113 should depart from the southern line of the land assigned by the decree to Domingo and Vicente, and hug the northerly *banks of the creek* to its outlet in the bay of San Francisco, so that from the beginning of line or course 94 to line or course 113, the lines of this portion of the grant should nowhere be coincident with the southern line of Vicente as defined in said decree, and gave it no western line on the bay until the survey reached the headland on the north side of the entrance to the creek on its bank in course 101. It necessarily also rejected that call of the description in the decree "the southern line being the line of division between this land and the land of *Antonio Peralta*, which line extends *from the said bay* to the most eastern boundary of the rancho of San Antonio."

In considering the jurisdiction of the Court we find no language which more aptly defines and limits it in this matter of survey than that used by this Court in The Fossatt Case, 2 Wall. 709, with a few local changes, as follows:

"This direction of the Court not only reformed the survey of the tract as made by the surveyor general, but reformed the decree of the Court itself entered in 1855, as amended in 1859, in pursuance of which the survey had been made. The Court assumed that the survey and location of the tract was not to be governed by the decree, but, on the contrary, that it was open to the Court to revise, alter, and change it at discretion, and to require the surveyor general to conform his survey and location to any new or amended decree; for certainly if it was competent to change the *western* line of the grant and claim, or the *southern* line of Vicente's land, or the northern line of Antonio's land, it was equally competent for it to change every other line or boundary as there described and fixed.

Now, it must be remembered that this decree of the District Court designated with great exactness the northern, southern, eastern, and western lines of the claim presented in the petition to the board, the claim confirmed, was entered in pursuance of and in accordance with the mandate of this Court, and by which the District Court was instructed that the northern, southern, and western external lines of the claim declared in it were in conformity with the opinion of this Court, and that the other line—the east line only, remained to be completed by a survey to be made, which would locate upon the ground the crest or

comb of the Sierra; the termini having also been ascertained and determined by this Court.

This radical change, therefore, of these lines of the tract involves something more than a change by the Court of its own decree; *it is the change of a decree entered in conformity with the mandate of this Court.* But we do not intend to place any particular stress upon this view, for we hold that it is not competent for the Court to *depart from its own decree* in the exercise of the power conferred by the act of June 14th, 1860. The duty enjoined is not a rehearing of the decree on its merits; it is to execute it, to fix the lines on the ground in conformity with the decree entered in the case. The decree is not only the foundation of the *validity of the grant,* but of the proceedings in the *survey* and *location* of the land confirmed.

The duty of the surveyor general, under all the acts of Congress in the matter of these surveys, is to survey and locate the confirmed *tract* in conformity with the decree. It is the only guide which is furnished to him; and one of the first instructions from the land office is as follows: "In the survey of finally confirmed claims you must be strictly governed by the decree of confirmation; and when the terms of such decree are specific, they must be *exactly observed* in fixing the *locality* of and surveying the claim."

"This instruction was given under the act of 1851, and in relation to the private land claims of California, and it was in accordance with this instruction that the survey of the land assigned to Domingo and Vicente Peralta was made and approved by the surveyor general March 3d, 1860, and filed in the court below August 10th, 1860, and which was rejected" and reformed by the Court below by the alteration of the southern and western lines, as shown by the survey.

After various proceedings by the District Court looking to the conformity of the survey with its *substituted decree* of November 22d, 1862, and the correction of certain surveys made by its direction,

Record, page 18, fol. 38-43,

the District Court passed its decree of June 5th, 1871, modifying its decree of November 22d, 1862, preserving, however, *the new lines thereby fixed;* setting aside the modified survey theretofore made, and again ordering the surveyor general to change the lines of the original survey, as so directed, and make due return.

This modified plat was filed July 26th, 1871.

Record, page 21, fol. 44,

and was followed at fol. 45 by a decree confirming such modified survey.

Thereafter, and in the year 1877, the Commissioner of the General Land Office caused a patent for the land so *surveyed* to be made and recorded.

Record, page 23, fol. 49.

Examination of the plat of this survey (Exhibit "B") will show that it does not conform to the decree.

The new decree of 1862, reversing, annulling, and setting aside the said decree of 1855 as amended in 1859, and the substitution of such new and different decrees, and its further decrees of 1871, were without the jurisdiction of the District Court. These decrees were not only void, but could not be the foundation of any valid proceedings under them.

U. S. vs. Levy, 13 Pet. 81.
U. S. vs. Forbes, 15 Id. 173.
Higueras vs. U. S., 5 Wall. 833.
Grisar vs. McDowell, 6 Wall. 377.
U. S. vs. Rico, 27 Fed. Cas. 806, 809, No. 16,160.

We have appended hereto a copy of the survey of 1871 marked Exhibit "B," and also a copy of the recitals contained in the patent of 1877, marked Exhibit "C."

The attitude of the District Court to the questions presented to it on the survey in question is very fully set forth in its opinion in this case reported in 27 Federal Cases 497, where that Court says:

"*It is not pretended that this Court has any power to reverse or annul its own final decrees* for errors of fact or law, after the term at which they were rendered, unless for clerical mistakes, * * * *still less has it any such power over the final decrees of the Supreme Court*—its duty being to execute the mandate, * * * but further, it is contended that by the act of 1860 all questions of location and boundary are referred to this Court, to be determined in a *new proceeding between new parties and on additional evidence.*"

U. S. v. Rico, 27 Fed. Cas. 806, 809.

After giving a deraignment of the title from Sola and description of the land whereof juridical possession was delivered to the grantee by Martinez, the learned Court says, on page 499, that "*the only tract to which Sola's grant could have referred was the tract of which the possession had been given by Martinez, and which is described in his report.* If, then, on

further examination it appears that the land described in the decree affirmed by the Supreme Court is not the same whereof possession was given by Martinez, it has appeared to me to be the duty of this Court under the Act of 1860 to conform to the obvious intention of the Supreme Court, rather than to the mere letter of its mandate, *and to cause to be surveyed to the claimants the tract of which Martinez gave possession, and which he describes in his report.*"

(This is exactly what the District Court did not do.)

"*I, therefore, think myself at liberty to inquire, not merely whether the official survey is in accordance with the terms of the decree of this Court affirmed by the Supreme Court, but whether it is in accordance with the possession given by Martinez, upon which the judgments of both Courts were founded.* * * *

But the opinion of the Supreme Court shows as clearly as if it had been so stated in the decree that the land intended to be confirmed was that described in the title papers; and the decree of the District Court is affirmed and adopted, because it was supposed to describe the same land, no suggestion to the contrary appearing to have been made or considered."

(The land described in the decree in this case and in the title papers is the Rancho of San Antonio as it was granted to Luis Peralta.)

At page 501, the learned Court says:

"The official survey is also objected to on the ground that it embraces lands on the *shores of the bay* below the ordinary high-water mark. These lands have been treated as having passed to the State of California as incident to her sovereignty on her admission to the Union, and they have been disposed of by the State as her own. I *do not understand it to be denied that the call in the grant for the bay as a boundary, bounds it by the shores of the bay.* * * *

It seems from the deposition of Stratton (the surveyor) that the official survey embraces lands below ordinary high-water mark, and in this respect it is evidently erroneous.

I think that the *western boundary should therefore be modified,* so as to exclude those lands lying below that limit, whether they be situated *on the bay itself or on the shores of any navigable estuary that may extend from the bay into the interior.*"

The instructions to the surveyor sent him *over three miles* into the interior, to the eastward of the bay, to discover its *shore,* and find the westerly line of the rancho; and also three miles inside the lines established by the decree of juridical possession.

See Exhibits—the plats of survey.

Van Reynegom vs. Bolton, 95 U. S. 35.

THE PUEBLO LANDS IN SAN FRANCISCO were described in the decree of confirmation as being bounded on the *east* by the bay.

Stratton, the deputy surveyor who had received and acted upon the instructions given in the decree in the Peralta case, afterward made a survey of the Pueblo lands.

In running the eastern line along the bay when he reached Mission Creek, emptying into the bay, having in mind the instructions in the Peralta case, he ran the line into the interior on the right bank of the creek a distance of about a mile, crossed the creek, and ran the line back on the left bank to the bay; extending back from the creek on each side so as to exclude from the survey a large tract of marsh land.

This method of surveying, instead of running the line across the mouth of the creek from headland to headland, was condemned by this Court as a departure from the description in the decree, which bounded the claim on the bay.

This Court approved as a proper survey one which ran this line across the mouth of the creek from headland to headland, and included the lands omitted by the Stratton survey.

The views of the heads of the Land Department, and of the Coast Survey in their official capacities, were cited by this Court in like condemnation of such method of survey.

Knight vs. United Land Assn., 142 U. S. 169, 195, 205-210.

See, also, the Map in 153 U. S., page 22.

Compare with *Exhibit D.*

Record, page 28, fol. 52g.

The learned District Judge lays down the proposition in the opinion quoted that he has no power to reverse or annul the decrees of the District or Supreme Court. With this proposition as his guide, he finds it to be his duty under the act of 1860 to depart from the decree, and change and modify a line of the grant and claim as confirmed ("which line along the bay constitutes its western boundary"), as described in the decree; by determining that the survey must ascend the creeks and sloughs, and omit the lands below the *banks* of the creeks and sloughs, notwithstanding they are included in the grant and juridical possession as described by Martinez, and which lands (he says) the Supreme Court intended to confirm, and did confirm, to Peralta by its decree affirming the decree of the District Court. Also to change and modify the southern line of the land assigned to Domingo and Vicente Peralta.

This was exactly what this Court held in the Fossatt Case was wholly without the *jurisdiction* of the District Court.

The Fossatt Case, 2 Wall. 714.
U. S. vs. Rico, 27 Fed. Case, 807.
Grisar vs. McDowell, 6 Wall. 377.

This line cannot be changed by the surveyor general or any department of the Government.

Tripp v. Spring, 14 Fed. Cas. No. 14,180 (5 Sawy. 209, 215).

Courts do not *sua sponte* execute their own decrees. They await action of the parties.

The District Court had never been asked to do any act in execution of the decree of confirmation until the present motion was made.

The Court had never, on the application of any person, or of its own motion, ordered to be brought before it a survey of the confirmed claim; and no such survey has ever been considered or adjudicated upon by the Court.

Few, if any persons, except the recording officer, have had occasion to read the patent of 1877. Its regularity and sufficiency have been assumed without question.

Upward of twenty years elapsed between the entry of the decree in 1855 and the date of the patent, and during this time a commercial city of upward of 30,000 inhabitants had grown up with daily transactions in its real property, based on the title established by the decree.

The infirmities of the survey and patent have never been brought to light until on the hearing of this motion they were exposed to the court below, and by it *ignored*.

The Peralta title is constantly recognized in the daily transactions in respect of the 46,685 acres confirmed, with the exception only of the 2,352 acres, which Judge Hawley figures out as having been lost in some mysterious manner between the entry of the decree and the date of that patent.

Assuming that the decree of 1871 is the *final decree*, that it superseded the decree of 1859, and that the patent of 1877 is in conformity with such decree of 1871, the learned Judge of the District Court says;

"The merits of this case have been settled by the final decree of this Court and the patents issued in conformity therewith."

Record, page 51, fol. 95.

And that is why he saw his way clear to deny this motion.

The averment that the decree of 1859 had not been executed by the issuance of a patent is admitted by the demurrer, and is conceded by the United States.

Record page 25, fol. 52.
Record page 28, fol. 52g.

We quote from the opinion as follows;

"I am of the opinion that this Court, after the rendition of the decree of 1859, under the provisions of the statutes of 1851, 1860, and 1866, retained jurisdiction of the cause, and had the power and authority to reject or approve *any survey* thereafter made, or *to otherwise change or modify the decree.* * * * This was accomplished by the orders and decrees of the Court made in 1871, *and the decree approving the survey must therefore be treated as the final decree of this Court,* * * * that subsequent thereto a patent was issued in conformity therewith. This Court was thereby deprived of any further jurisdiction in the premises."

Record, page 43, fol. 80.

"The question of the sufficiency of the petition to require an answer is alone involved. To determine this question it is only necessary to inquire and decide whether from the averments in the petition and the so-called demurrer, the decree of 1859 is the final decree of this Court, and whether this Court has any jurisdiction to order a patent to be issued as prayed for by the petitioner."

Record, page 45, fol. 84.

"I deem it unnecessary to discuss at any length the provisions of said section 8, because if the decree of 1859 *is not the final decree,* that act has no application to the proceeding herein. If the Court retained jurisdiction under the acts of 1851, 1860, and 1864, up to the time of the decree of 1871, and thereafter until the patent was issued, that fact disposes of the motion made by the petitioner. *The act of 1866 is not, and could not be, applicable to this case, except upon the theory of the petitioner that the decree of 1859 is the final decree.*"

Record, page 49, fol. 90.

"If the patents issued, in pursuance of and in conformity with the decree of this Court in 1871, approving the survey made by the surveyor general, are (as hereinbefore declared to be) valid, then it necessarily follows that the relief asked for cannot be granted."

Record, page 50, fol. 92.

The learned Court below also said:

"If the decree of 1859 was final in the sense that it determined the validity of the grant, *it was not a final decree in the full sense of that term,* because it did not determine the correctness of the survey, and could not do so until it was made by the surveyor general and *presented to the Court.*"

Record, page 44, fol. 80.

In so saying the learned Court lost sight of the distinction between the decree and its execution, between the vocation of the Court and that of the surveyor, under the act. The decree determined the validity of the grant and its location; that was the function of the Court. The surveyor was to ascertain by survey its location on the ground. That was the function of the surveyor.

The Fossat Case, 2 Wall. 714.

There is nothing in the acts of 1851 or 1860 requiring *submission by the surveyor of his surveys of private land claims to the District or any other Court.*

Miller vs. Dale, 92 U. S. 477.
McCreery vs. Haskell, 119 U. S. 333.
Castro vs. Hendricks, 23 How. 442.
U. S. vs. Rico, 27 Fed. Cas. 808.
U. S. Sepulveda, 1 Wall. 104, 107.

He was to survey the confirmed claim as it was located by Mexico. If he surveyed anything other than the confirmed claim, he was acting outside of the powers conferred upon him.

Bissell vs. Henshaw, 1 Sawy. 589 (F. C. 1,447); S. C., 18 Wall. 262.
Supervisors vs. U. S., 4 Wall. 435, 446.
The Fossat Case, 2 Id. 649, 714, 727.

If the Court below erroneously rejected his survey, and erroneously instructed him to survey another and different claim under another and different decree, could that Court, or the surveyor acting under its instructions, thus destroy the right of property established by the decree of this Court?

Naturally, a survey can only interpret the decree under which it is made. It cannot be made to fit any location other than that which is *described in the writing.*

If an approved survey did not embrace all the lands confirmed it could not operate to take away from the confirmee the omitted lands. Such a result would give the surveyor power to re-

verse the decree itself; and give him jurisdiction to determine the title to the omitted lands—to establish their ownership; to *grant* them to some one other than the confirmee.

12 Stat. at Large, chap. XC, page 410.

If operative upon the lands surveyed, *it left the title to the omitted lands where it was placed by the decree.* That land would still be the property of the confirmee. *Its omission from the survey could not be translative of title to any other party.*

Adam vs. Norris, 103 U. S. 594.
In re Pueblo, 5 Land Decisions, page 491.
Tripp v. Spring, supra.
Fremont v. U. S., 17 How. 542, 563.

If a man has really acquired title to land, he cannot afterward be *mapped out* of it by other persons.

Payne vs. English, 79 Cal. 547.

The undisputed testimony of the land department shows that no effort was made to execute this decree except by surveys of several portions of the confirmed grant whereby there was omitted from survey a large portion of the land confirmed.

See opinion of Assistant Commissioner Best.

Record, page 25, fol. 52.

See opinion of Assistant Commissioner Mondell.

Record, page 27, fol. 52d.

And that the patents issued upon such surveys omitted the lands which had been omitted from those surveys.

Record, page 26, fol. 52b.
Record, page 28, fol. 52g.

The answer made by the demurrer that the decree of 1859, was reversed by the District Court, and new boundaries substituted for the boundaries established by the decree, that whether those boundaries conformed to the decree of confirmation was a closed question, which this Court had no jurisdiction to inquire into, was a mere evasion. That when the question to be considered was conformity of the survey and patent with the decree, this Court was powerless to say to the District Court —this is not the decree we directed you to execute; this is not the land whereof confirmation was made by you; we must accept as a conclusive answer to our mandate, that any survey however erroneous, however divergent, from the lines of the

decree, is full performance of our mandate requiring execution of your decree.

If a survey which confessedly omits 2,352 acres of the land in the tract confirmed is execution of the decree, why not a survey which omits one-half or three-quarters of the land? If one acre can be lost by survey, why not the whole tract?

If in execution of the mandate the District Court had discretion to extinguish any, why not all of the boundaries of the tract? One boundary is as vital to the integrity of the decree as any other, and any change of boundary created a new decree, and in effect reversed the decree of this Court.

If the District Court could change any boundary, it would be because it had jurisdiction to try anew the issue submitted to and determined by this Court on the former appeal.

Chaires vs. U. S., 3 How. 619.
U. S. vs. Knight, 1 Black. 489.
Taylor vs. Maguire, 17 Wall. 283.
Re Sanford Fork & Tool Co., 160 U. S. 255.
U. S. vs. DeRodrigues, 7 Sawyer, 646.

There is no foundation for the assertion that the United States has performed her political obligation in respect of this property.

On the contrary, it abundantly appears by the opinions of the land department and of the Courts, that she had not performed it.

Mr. Commissioner Best says:

"The parties named show that they are the owners respectively of an undivided interest in said rancho, and ask that a new patent be issued including not only the lands already patented, but also the land covered by the waters of San Antonio Creek, which is not included in the patents heretofore issued."

Adding that *"the contention of the petitioners is to the effect that as the bay of San Francisco is the western boundary of said grant as confirmed, they are entitled to a patent for the lands covered by the waters of San Antonio bay (creek), and request the issue of a second patent to the Peraltas for the whole of the grant, including the land under the waters of said bay (creek)."*

Record, page 25, fol. 52.

Mr. Commissioner Mondell, addressing the surveyor general in respect to the plat of survey of 1895, says:

"This is the only map, purporting to be a map of the entire rancho, which has ever been prepared and filed. Upon this map

you have so extended the western boundary line from headland to headland along the shore of the bay of San Francisco as to include therein area of about one thousand five hundred and fifty acres for the so-called San Antonio bay (creek), and of about eight hundred and two acres in the San Leandro bay, which were explicitly excluded from the approved surveys upon which patents were issued."

Record, page 28, fol. 52g.

The District Court, presided over by Judge Hawley, says in 99 Fed., page 625:

"The quantity of land claimed (confirmed?) embraced about 46,685 acres; embraced in the patents was only 44,333 acres, being 2,352 acres less than was included in the survey of 1895." And this, says the commissioner, was the only survey of the grant ever made.

Record, page 44, fol. 82.

In the face of these assertions and admissions, upon what pretext can the Department of Justice be heard to demand affirmance?

U. S. vs. Flint, 4 Sawy. 58.
Tripp v. Spring, supra.

This Court will take judicial notice of the geography and topography of the rancho as shown on the maps of Alameda County, California. *It appears from these maps that San Antonio creek and San Leandro bay are not portions of the bay of San Francisco; that they are within the exterior lines of the grant, and lie to the eastward of the* westerly boundary of the grant. Compare with survey of 1895, and chart of United States coast survey of 1859, copies of which surveys, and of the material portion of the chart are hereto attached as exhibits, and the latter is marked Exhibit "D."

The political obligation of the United States to perfect and protect titles derived from Spain or Mexico, delegated by Congress to this Court, cannot be completely performed in respect of this rancho until this Court shall have adjudged execution of its decree in this case.

The power of the United States to patent the confirmed claim is a continuing power, and can only be exhausted by its complete performance.

Adam vs. Norris, 103 U. S. 591.

No mere lapse of time can toll the right of the claimants to execution of the decree.

Act of 1851, sec. 13.
U. S. vs. Pacheco, 22 How. 225.
Henshaw vs. Bissell, 18 Wall. 255, 270.

Counsel for appellants are not aware of any question having arisen in this case, as stated by the Court below, whether the State of California had the superior right by virtue of its sovereignty, over the tide and submerged *lands in San Francisco bay* (p. 625).

Record, page 44, fol. 81.
Act of July 23d, 1866, sec. 1, 14 Stat. 218.

Whether the State had title to any of the lands of this rancho was involved in the consideration of the surveys brought before the Court. The pretense on which Carpentier and others were admitted to contest those surveys, was that they had derived an interest from the State of California in lands covered by the waters of San Antonio creek.

Record, page 16, fol. 35.
Record, page 28, fol. 52f.

It was as to lands of this rancho under water that Carpentier had contended that he had derived title from the State because they were *tide* lands; with respect to which, when the United States acquired Alta California she held them only in trust for the future State. *This would have been so had those lands belonged to the public domain of Mexico.*

Knight vs. U. L. A., 142 U. S. 185.
Tripp vs. Spring, Fed. Cas. No. 14,180.

If the lands in question are within the boundaries established by the decree of 1859, they belonged wholly to the Spanish grantee; the United States could not, and did not, hold them in trust for the future State; *could not and did not become source of title in the State of California,* or her assigns.

Ibid.
Lowndes vs. Huntington, 153 U. S. 22.
Teschemacher vs. Thompson, 18 Cal. 87.
U. S. vs. Conway, 175 U. S. 70.

The United States held them in trust for the grantee of Spain, and on the passing of the decree, became *trustee* for the confirmees.

Barney vs. Dolph, 97 U. S. 652, 656.

Why the United States or claimants under her were admitted to contest any survey except survey of the *exterior* lines of the grant, is not apparent; unless for the reason that error begets error.

U. S. vs. Estudillo, 1 Wall, 719.

The parties carrying on the contest about the survey in question had no interest therein. They were fighting a sham battle over other people's property rights. And the issue of such contest could not be the foundation for a decree affecting the property rights of the real owners.

U. S. vs. Estudillo, 1 Wall, 719.
Miller vs. Dale, 92 U. S. 477.

In determining by a summary *ex parte* proceeding that the assigns of the State had such an interest therein as made it proper that they should be heard in opposition to the survey approved in 1871, *the District Court did not pass upon any question of title.* The act of 1860 dealt with *surveys only,* and not titles; did not invest the Court below with power to endow Carpentier with title to the property of Peralta. *That* Court was only given jurisdiction of *land confirmed* to ascertain if *its* survey conformed to the decree. *It got no jurisdiction over land which it might decide was improperly included in the survey;* could not determine its title.

Ibid.
Potter vs. Randolph, 58 Pac. Rep. 905.

We annex a copy of the recitals of the patent to Domingo and Vicente, marked Exhibit "C."

Assuming that the District Court had power to assign a portion of these lands to Vicente and Domingo Peralta by its decree of 1855 as amended in 1859, that decree has never been executed pursuant to the mandate of this Court by survey on the ground followed by patent.

Knight vs. United Land Association, 142 U. S. 200.
Lowndes vs. Huntington, 153 Id. 1, 22.

In further illustration of the insufficiency of the approved surveys under the Peralta grant to show conformity of survey with decree, we direct attention of this Court to the portion of the rancho, which the Court below says was confirmed to Antonio Peralta and to its decrees, surveys, and patent, hereinafter set forth.

The patent issued to Ygnacio Peralta also excluded the lands

covered by the waters of San Antonio creek and San Leandro bay, as will appear from the records of the land department; to which we call attention of the Court.

The issued patents were, however, records of the Government of the existence and validity of the *grant*, and establish the title from the date of the grant.

Teschemacher vs. Thompson, 18 Cal. 26.

The decree assigning a portion of the grant to Vicente and Domingo Peralta gives its western and southern bounds as follows:

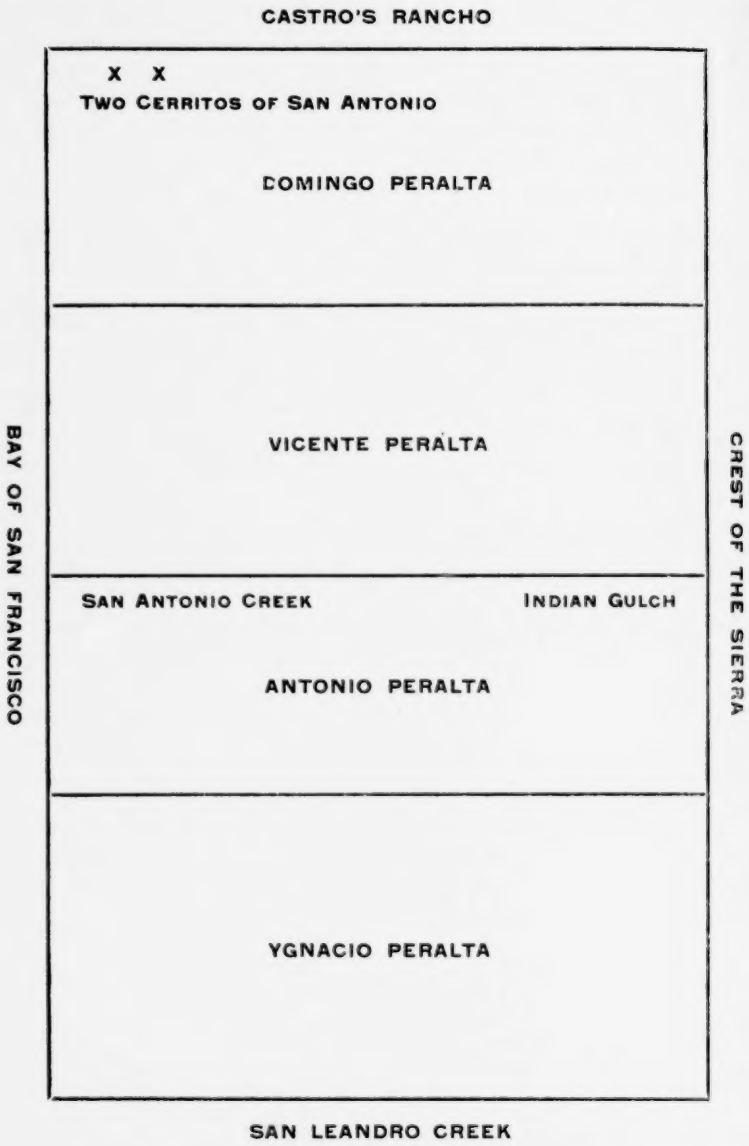
On the west by the bay of San Francisco, and *on the south* by a ravine a short distance south of the buildings in the town of Oakland; on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio.

Record, page 7, fol. 14.

The decree assigning a portion of the grant to Antonio Peralta gives its northern and western bounds as follows:

On the *north* by a ravine a short distance south of the buildings in the town of Oakland; on the north of which ravine there is a small house in sight of the public road, being the division line between the lands hereby confirmed and the lands confirmed to Vicente and Domingo by said decree of the 26th of January, 1855; on the west by the bay of San Francisco, and on the east by the comb of the Sierra.

Reading these decrees together it will be seen that the *southern* line of Vicente is coterminous throughout with the *northern* line of Antonio. An accurate survey of both tracts must bound one by the other.



THE RANCHO OF SAN ANTONIO

Exhibited in the form of a rectangular parallellogram. Divided into four parcels as contemplated in the stipulation recited in the patent to Antonio.

Antonio Peralta had presented his petition to the board, claiming title to portion of the rancho under the grant and the devise; and on February 7, 1854, the board had made a decree confirming this claim.

December 4, 1855, the District Court made a decree affirming the decree of the board.

Appeal from this decree was taken to this Court, in the year 1856.

This appeal was dismissed *October 20, 1857*, whereby the decree of December 4, 1855, became final.

In the meantime, and on the 29th day of January, 1857, *pending the appeal*, the District Court made a decree annulling and setting aside the decree appealed from, and substituting another decree in its place.

Thereafter there was ordered into court a plat of survey of the portion assigned to Antonio *by the decree of January 29, 1857*. This survey was approved by the surveyor general October 19, 1858, and certified by him; and objections to it having been made, heard, and considered, the District Court, February 3d, 1863, rejected the survey, and by its decree of that date changed and modified the boundaries established by the former decree; changed all the lines and courses thereof between the lines or courses 53 and 68, so as to run along the inner line of the shore, excluding from said survey, *and from the lands confirmed* the waters of the bay of San Francisco *and of the arms thereof*, and the lands covered thereby, and directed that a re-survey be made conformably to such new decree.

We annex a copy of this rejected survey, marked Exhibit "F."

A new survey was made and approved by the surveyor general conformably to the said decree of 1863, and the plat of that survey was afterward confirmed by the Court.

We have annexed a copy of this plat marked Exhibit "E."

Under this decree the Land Department made and recorded in the year 1874 a patent to Antonio for the lands so surveyed.

We annex a copy of the recitals in this patent marked Exhibit "G."

The decree of December 4. 1855, being the final decree in this case (Antonio's), and no survey of it ever having been made or approved, the patent issued to Antonio Peralta was void on its face for want of conformity to such final decree.

A judicial decree cannot create title. It can ascertain and determine that title exists and in whom it is vested. In respect of the lands ceded by Mexico to the United States it can ascertain and determine whether any, and what part of it is private

property, and who appears to be its owner, with a view to its conveyance to such owner by the United States.

Neither does a patent from the United States *create title.* It is recognition of a pre-existing vested right. It is evidence of an existing title in the lands patented.

Cornelius vs. Kessell, 128 U. S. 456, 461.

The patent is the mere ministerial act of the officer charged with the duty of making it.

U. S. vs. Levy, 13 Peters, 81.
U. S. vs. Forbes, 15 Id. 182.
Simmons v. Wagner, 101 U. S. 261.
Tripp v. Spring, supra.

The act imposing the duty is a limitation upon the powers conferred. The land *granted* or confirmed is to be surveyed, and when surveyed is to be patented. But the *granted lands* and the *surveyed lands* must be the same to sustain the patent.

The Government must have granted the land or the judiciary must have ascertained that the land to be patented had been previously granted; that it is the property of the proposed patentee; and that an obligation rests on the patentor to patent it to him.

Hence, in order to be valid, the patent must show on its face a grant or decree, a survey in strict accordance therewith, and be a conveyance of the land granted or decreed.

If the legal title to lands *wrongfully* omitted from the patent remains in the United States, it is the duty of the officer who committed the error of omission to repair it by issuing a *new patent* which will include such omitted land.

Adam vs. Norris, 103 U. S.
Cornelius vs. Kessel, 128 Id. 456, 460.
Knight vs. United Land Assn., 142 Id.

A title established by judicial decree cannot be impaired by the act or omission of a ministerial officer. If the law directs him to make a patent for the title so declared, the duty devolves upon him in respect of the land confirmed until he has fully complied with all the requirements of the law.

Otherwise the patent is the grant; is the source of title, and the typewriter or scrivener who prepared it is the grantor.

If the grant or decree is for one thing, and the patent for another, one must fail. The grant or decree having established the title, the patentor cannot reverse either, and his action in

so doing is void. His void act cannot be imputed to the United States. Neither can the United States shelter herself behind this void act, as being performance of the duty enjoined upon her by Congress.

In this proceeding we have:

I.

a. Grant *with livery* by Spain to Luis Peralta of the whole of the rancho of San Antonio in 1820.

b. Succession under the laws of California in the four sons of the grantee.

c. Decree of the District Court affirming the grant and the claim of title of the sons.

d. Decree of the Supreme Court affirming this decree, and its mandate to the District Court directing execution.

e. Final survey of the land confirmed duly approved by the surveyor general.

f. Exhibition of decree and plat of survey to commissioner, and demand of patent.

g. Refusal of the land department to make a patent.

h. Motion to the District Court for execution of the decree.

i. Order denying motion.

j. Appeal from this order to this Court.

II.

a. Grant by the District Court (?) by its decree of January 26, 1855, to Domingo and Vicente Peralta of a portion of these lands.

b. Decree of this Court affirming this concession (?).

c. Decree of the District Court reversing the decree of this Court, and substituting for it new decrees of 1862 and 1871 for other lands.

d. Approved survey of the land described in the new decrees.

e. Patent for the land so described, reciting the decrees of 1855 and 1862, and a plat of survey under said decree of 1871, omitting 2,352 acres of the "*lands confirmed.*"

This error is confessed by the District Court in its decree of November 22d, 1862, in its direction to the surveyor to exclude from survey of "the *lands confirmed* the waters of the bay of San Francisco, *and of the arms thereof,* and the lands covered thereby."

Record, page 17, fol. 38.
See, also, U. S. vs. Peralta, 27 Fed. Cases, pp. 497, 501.

This error is confessed by the Land Department.

Record, page 26, fol. 52b.
Record, page 27, fol. 52e, f, g, and h.

III.

a. *Grant by the District Court* (?) by its decree of December 4th, 1855, to Antonio Peralta of a portion of the lands of the grant.

b. Appeal to this Court therefrom, perfected in the year 1856.

c. Pending this appeal, and on January 29, 1857, decree of the District Court reversing and setting aside said decree of December 4th, 1855, and substituting another decree therefor.

d. Decree of October 20, 1857, dismissing the appeal to this Court with leave to claimant to proceed under the decree of December 4, 1855, as on final decree.

e. Decree of the District Court of February 3d, 1863, reversing and setting aside decree of December 4, 1855, and substituting for it, its said decree of 1863 for other lands.

f. Survey of the land described in this new decree, the decree of February 3d, 1863, approved by the District Court.

g. Patent for this land reciting the said several decrees of 1855, 1857, and 1863; and survey under the decree of 1863, omitting from the tract surveyed 2,352 acres of the *"land confirmed."*

See exhibit G.

This error is confessed by the District Court in its decree of 1863, directing the surveyor "to exclude from the *lands confirmed* the waters of the bay of San Francisco, and *of the arms thereof*, and the lands covered thereby."

And by the land department.

Record, page 27, fol. 52e, f and g.

IV.

A similar decree and patent to Ygnacio Peralta for the extreme *southern* portion of the grant with the *like* omissions.

It is only when the patent shows upon its face that it is made in conformity with the requirements of law that it is unassailable.

A patent which should recite a grant of a lot of land in the city of San Francisco, a survey of a lot in the city of Oakland, and a conveyance of the last-named lot, could hardly be sustained by any tribunal.

A patent not authorized by law is void.

Burfenning vs. Chicago etc., 163 U. S. 321, 323.

Where a patent has been wrongfully made and recorded by inadvertence or mistake of the land department, it is the duty of this Court and it has jurisdiction to set aside the patent that the land department may have an opportunity to correct its mistake.

Where, as in the case at bar, the land department has mistaken its power, and refused a patent, and the mistake of the department is based upon errors of the District Court; and the case is still *sub judice* on the question whether that Court has obeyed the mandate of this Court, can it be that this Court has no power to correct the errors and mistakes of both of them, and restore to the Court below jurisdiction to execute the mandate and of the land department to correct its mistake?

Germania Iron Co. vs. U. S., 165 U. S. 379, 383.
Duluth & Iron Range R. Co. vs. Roy., 173 Ind. 587.

If the title to one acre of this land was vested in Luis Peralta and passed to his successors in interest, then the title to *each acre* of the remaining 46,684 acres is in like manner vested in such successor.

The title to each acre passed by the grant by one instrument; by will to the four sons, by one instrument; confirmed by one and the same decree. If there is no title in them to any *one* of the acres, they can have no title to the remaining acres. If they have title to one acre they are entitled to all the acres. If the United States has title to any one of the acres, except through Peralta, she owns all. Her Courts committed a grievous error in depriving her of any portion of her property, and giving it to Peralta.

The recent census shows the population of Oakland and vicinity within the limits of the grant to be upwards of 150,000. At least one-tenth of this number own, by title derived from Peralta, the land they occupy.

Each one of these land holders is interested in the execution of the decree of 1859; each one of them is interested in having a valid muniment of title to his land. Each one of them, as well as appellants, is entitled to demand from this Court in a separate proceeding, that the United States execute the decree of confirmation.

The land department must obey the law, and this Court has jurisdiction to compel obedience.

If the department mistakes the law and makes out and records patents, for which there is no warrant in the law, its acts concern only it and the United States.

U. S. vs. Stone, 2 Wall. 535.

It must act under the decree of the Court ascertaining the ownership, and unless and until its patent conforms to the decree, its action cannot be sustained.

Beley vs. Naphtaly, 169 U. S. 353.

If Courts have power to enforce the specific performance by a private litigant of his contract to convey real property, they have the power over the United States to compel specific performance of her contract to convey.

The naked legal title is in the United States. It can only pass by survey and patent. The survey has been made by her authority; but she refuses to patent the land surveyed.

Appellants are not complaining that a patent for the confirmed claim has been made to the wrong person. Their cause of complaint is that *no patent for such claim has been made to anyone.*

The United States can commit no error in conveying the granted lands to the appointee of this Court. If her ministerial officers obey the decree of the Court and the act of Congress by making the patent, the responsibility will not rest upon the land department or the Department of Justice; but upon Congress, which gave the Court jurisdiction to make the decree; and upon the Court which made it, and required it to be executed.

The authentic evidence of what is private property is to be found in the grants of the Government of California. The grant to Luis Peralta passed to him a present and immediate interest; unless that interest has been forfeited and revested in the Government, the United States is bound in good faith to uphold and protect it.

This Court has defined one office or function of a patent under the act of 1851, "As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land."

Beard vs. Federy, 3 Wall. 491.
Langdean vs. Hanes, 21 Id. 521.
U. S. vs. Conway, 175 U. S. 70.

But it performs another office.

This Court says in the Beard case:

"The patent is a record of the action of the Government upon the title of the claimant *as it existed upon the acquisition of the country.* The inhabitants were entitled by the law of nations to *protection of their property rights, to the same extent as under the former Government.* The treaty of cession also stipulated for such *protection.*"

Beard vs. Federy, supra.

The *protection* provided for was protection against spoliation by the people represented by Congress, by the special sovereignties which might spring into being in the ceded territory, or by the Courts of either sovereignty.

Strother vs. Lucas, 12 Pet. 438, 439.
Story on the Constitution, sec. 1330.
U. S. vs. Flint, 4 Sawy. 47, 65, 70.

When the United States makes the patent provided for in the act of 1851, it is her solemn declaration that she has completely performed the obligation of *protection* imposed upon her by the treaty.

That she thereby invests the confirmee with the evidence of his title, which will guarantee it to him in like manner "as if the same belonged to citizens of the United States," and entitle him to the recognition and protection of his future sovereign, the State.

Fremont vs. U. S., 17 How. 542, 553.

Will enable him to assert and maintain his title in the courts of the United States and of the State, from the date of the patent, unaffected by previous adverse legislation by either Government.

Henshaw vs. Bissell, 18 Wall. 255, 270.
Los Angeles vs. Thompson, 117 Cal. 601; S. C., 180 U. S. 72.
Botiller vs. Dominguez, 130 U. S. 247-254.

It is this quality of the patent which constitutes its chief value.

It enables the claimant to say: *"This is my property."*

When such patent shall be made, the aim of the statute, expressed in its title to "settle private land claims," will have been attained.

Mr. Justice Miller delivered the opinion of this Court in the case of Adam vs. Norris, 103 U. S. 591.

The action was ejectment. Both parties claimed the legal title under patents from the United States issued upon confirmed Mexican grants and based upon surveys approved by the general land office. Each patent included the land in controversy.

The defendant's grant was for the Rancho Guadalupe, and was dated March 21, 1840, followed by patent in 1870; the plaintiff's grant was for La Punta de la Laguna, and was dated December 29, 1844, followed by patent in 1873.

The defendants thus held the older grant from Mexico and the older patent from the United States.

The plaintiff's survey was approved by the surveyor general January 29, 1861, after certain proceedings had under the act of 1860. The defendant's survey was in like manner approved in June, 1867.

A patent was made out and recorded for the Guadalupe Rancho in 1866, which omitted a portion of the lands confirmed, of which the demanded premises were also portion.

This patent was not satisfactory to the patentee who called the attention of the commissioner to the omission in question; and that officer ordered a new survey, by which the omission was repaired, and this was followed by the patent of 1870.

Counsel for the plaintiff argued that his *survey* had the same effect and validity in law under the act of 1860 as a *patent*, and that as this survey was made before the date of the patent of 1866, it gave plaintiff the title to the premises included in his survey, and the survey being the equivalent of a patent, it was final and conclusive on everybody, and that the title conferred could not be disputed in a court of law.

He also contended that the patent to the defendant of 1866 terminated the authority of the land office in the matter, and that the defendant's patent of 1870 was therefore void.

This Court held that where the United States was dealing with the public domain, the proposition that the patent is unassailable is generally, if not always, true.

But where the land had been granted by Spain or Mexico, the patent was a quitclaim—an admission that the ownership had never been in the United States, but had passed at the time of the cession to the claimant or his grantor.

Such a patent was therefore conclusive evidence only between the United States and the grantee that the latter had established the *validity of the grant*.

This Court further held that no intervening valid rights having accrued before the patent of 1870, the making of that pat-

ent was within the powers of the land office, unaffected by the existence of the patent of 1866.

That if the patent of 1866 be valid as to the land covered by it, that does not make void the patent of 1870, for land not covered by it.

The deeds are not in conflict. If the power of the land office was exhausted by the first deed, it was only so as to the land which it included. The legal title to that alone could pass by the patent, and if the title to the land now in question remained in the Government, the patent of 1870 was sufficient to convey it, and did convey it.

This Court likened the case to that of a grantor, who having failed to convey what he was bound to convey, makes another deed to correct the wrong, and held that title to the demanded premises passed by the later patent, whether or not the patent of 1866 was or was not canceled.

In the present case there were only two parties to the contest initiated by the petition to the board.

The petitioners; claiming under the grant from Spain.

The United States; claiming under the cession from Mexico.

There were no valid conflicting claims under the grant, no conflicting grants, no overlapping boundaries, and no conflicting patents.

This Court held that title passed by the grant, and adjudged the claim of the petitioners to be valid.

It also necessarily held that title did not pass by the cession to the United States, and rejected its claim of title.

The object of the petition was to obtain a decree of confirmation, and survey and patent conformably to the decree. To that the confirmees were entitled under the act.

Unless that is conceded it might as well have been decided that title passed by the cession. If, notwithstanding the decree, a ministerial officer of the United States can defeat it, why was the grantee subjected to the expense and trouble of making manifest to the Court, his rights? Why not have referred him in the first instance to the surveyor and the commissioner?

Congress imposed upon the commissioner the duty to give the confirmee a patent conformably to the grant and decree. If he did not do it; if he refused a patent, or if by mistake or inadvertence he made a patent for some land other than that granted and decreed, can it be said that the officer has performed his duty? The confirmees could not control his action or inaction; could not direct how he should perform his duty.

If the commissioner had any control over the subject it nec-

essarily embraced the examination of surveys and their correction until made conformable with the right conferred upon the claimant by judicial decree. He was invested with this power, if at all, to prevent the consequences to individuals as well as the public of accident, inadvertence, irregularity, or obvious fraud. It is only in the exercise of such power that he could make or refuse to make a patent. If then he finds upon inspection of the decree that the survey does not conform to it, it is his duty to refuse a patent. If he finds that it does conform, it is equally his duty to make a patent conformably to the decree. But the survey of 1895 became final without his approval, as we have already shown.

In such case the confirmees, being the only party interested, could consent that the commissioner go behind the record, reconsider his action, re-examine the matters intrusted to him by law, and if found to be erroneous reform such errors and mistakes. No third party could object to this course, and the United States is estopped by the decree.

This motion is persuasive evidence of such consent.

If any third party has superior rights, they would be no more affected by the correction of errors whether in the survey or the patent, than they could have been had the error never been committed.

When the commissioner considered the plat of survey of 1895 and found: "This is the only map, purporting to be a map, of the entire rancho which has ever been prepared and filed," it became his duty under the law, and the power conferred on him, to make and record a patent upon that survey.

If this survey conformed to the decree, the commissioner had no duty to perform but to obey the decree.

Congress had power under the constitution to "Constitute tribunals *inferior* to the Supreme Court."

Could not confer upon the commissioner judicial power superior to that conferred by the constitution upon this Court. The constitution was a limitation upon the power of Congress.

Martin vs. Hunter, 1 Wheat. 304.

The commissioner had the decree before him. He inserted it in the patent that he made and recorded, and he inserted in the same patent a survey which showed on its face that it did not conform to the decree.

The commissioner demonstrated in his opinions in this case that the surveys made did not conform to the decree; did not embrace all the lands confirmed.

Commissioner Best, speaking of the division line of the lands assigned to Domingo and Vicente Peralta and Antonio Peralta, respectively, says that "it appears to be a ravine, which is San Antonio creek, shown to end in San Antonio bay, an arm of the bay of San Francisco. Patent issued to D. & V. Peralta for the lands *north* of the ravine to said bay of San Antonio; *the survey running at the water line around said bay;* and patent issued to Antonio for the lands *south* of said bay and ravine; the survey and patent following *the water line of the bay of San Antonio.*

"Contention of petitioners is that as the bay of San Francisco is the western boundary of the grant as confirmed, they are entitled to a patent for the land covered by San Antonio bay, and request the issue of a second patent to the Peraltas for the *whole of the grant* including the land under the waters of said bay." Adding: "Action by the Courts upon the surveys of these claims precludes this office from further action."

Commissioner Mondell, speaking of the surveys, says that they "fixed the middle of the San Antonio creek and of the so-called San Antonio bay, as the dividing line between the lands of Vicente and those of Antonio."

That Carpentier and others claimed adversely land lying under the waters of that arm of the bay of San Francisco, known as the estuary of San Antonio, up to the highest tide lines, through mesne conveyances from the State. That the District Court sustained this contention and finally approved the survey which fixes *the lines of said grant* "to run along the inner shore, excluding therefrom and from the *lands confirmed*, the waters of the bay of San Francisco and the arms thereof, and lands covered thereby as far as the tides ordinarily flow at the full and change of the moon, and patents were issued by this office upon the survey so approved."

That petitioners contend they are entitled to a patent which *includes all the lands confirmed*, which contention cannot be sustained, and the motion must therefore be denied.

Record, page 25, fol. 52a.
Record, page 28, fol. 52f, 52g, 52h.

The case of Adam vs. Norris is only distinguishable from this, in that in Adam vs. Norris the commissioner had made and recorded a patent under the decree which omitted portion of the land confirmed by the decree.

The commissioner thereafter, at the request of the patentee and with his consent, recalled the patent, re-examined the rec-

ord, and discovering his error, made and recorded a new patent including the land omitted in the patent which he had recalled.

In the case at bar the commissioner has never made a patent for the land confirmed.

There is no patent to be accepted or rejected.

No patent to be recalled and set aside to admit of his making and recording the patent to which the confirmees are entitled under their grant and decree.

Bell vs. Hearne, 119 How. 252.
U. S. vs. San Jacinto Tin Co., 125 U. S. 318.

The treaty of Guadalupe Hidalgo was not only a contract, but it created a trust in lands of the ceded territory in favor of the grantees of Spain and Mexico.

Congress confided to this Court the execution of this trust.

Head Money Cases, 112 U. S. 598.

The Department of Justice may urge successfully the plea that the United States can rescind the contract and repudiate the trust.

But it will be the duty of the United States, before she can rescind the contract, under the laws of California, to restore to Mexico the ceded territory.

Cal. Civil Code, sec. 1691.

When the United States has stricken from her flag the brightest star that illumines its western border, and has returned it untarnished to Mexico, the Department of Justice may invoke the power of this Court to affirm the judgment of the District Court on this motion.

The fears expressed by the learned Judge of the District Court that "If the present motion could be sustained, and a new order made in disregard of the final decree (?) of this Court, it would open up a new field of inquiry, and create future litigation that would be endless,"

Record, page 51, fol. 95.

seem to us to be ill-founded. As the holders of the title derived from Luis Peralta are protected by the decree of 1859, the making of a patent for their lands, *however long delayed,* could not unsettle their title; it would settle it, and give to it the conclusive character intended by the treaty and by the act of 1851. No one deriving title under Luis Peralta could be ousted from his holdings, under a patent founded on the grant to him, as the patent would be an affirmance of the title so derived.

Morrow vs. Whitney, 95 U. S. 554.
Tripp vs. Spring, supra.

It appears to us, that the most effectual way of putting a stop to litigation about the title to private land claims in California is for the Courts to do their duty in perfecting in the owners the evidences of their title, provided in the treaty and the act.

No duty was imposed upon the claimants by the act, except presentation and prosecution of their claims, and when found valid to demand patent. If the United States was defeated, she was to be the actor in the execution of the decree. She was to issue the patent when it might be requested by the confirmee.

There is nothing ambiguous in the language used by Congress; there is no room for construction; it is the word of command *"and for all claims finally confirmed * * * a patent shall issue to the claimant."*

Sec. 13, act of 1851.

Legislative acts are not to be construed to subvert property rights.

Rutherford vs. Green, 2 Wheat. 203.
Supervisors vs. U. S., 4 Wall. 435, 446.

A patent "conformably to the decree" is the right of the confirmee. Until such patent is made, the contest between the United States and claimant is still *sub judice.*

If the survey of 1895 is a survey, the only survey of the claim confirmed, a patent under it, and only such patent, "would be a patent conformably to the decree," and the District Court has jurisdiction until such patent is made.

It devolves upon the United States to establish that such a patent has been made, and if it cannot do so, to make it.

The duty and right will then devolve upon the confirmees to accept or question such patent.

The United States is a political entity. A trinity composed of three departments: Legislative, Judicial, and Executive.

Her will is expressed through her legislative department, whose laws within the limits of the constitution must be interpreted and sustained by the judicial department, and enforced by the executive.

The will of the legislature in respect of claims of title to land originating under the former Government of California is expressed in the act of 1851.

If the claim was decreed to be valid by the board or the Courts, the decree was to be conclusive on the United States, conclusive upon the trinity, and each member of it.

The Judiciary which pronounced the decree under legislative authority must obey and enforce it, through the Executive Department; which must perform the ministerial duty imposed on it.

Martin vs. Hunter, 1 Wheat. 304.

Is this the hospitality which the decree in this case has met from the United States? Her District Court has refused to recognize or enforce it. Her Executive has refused to issue a patent upon it.

"Of what value is that title which communicates no right or interest in the land itself? Or, how can that be said to be any title at all which cannot be asserted in a court of justice by the owner to defend or obtain possession of his property"?

Green vs. Biddle, 8 Wheat. (5 Cond. Rep. 373).
Law Notes, vol. IV, No. 6, page 111.

What has become of the title with which Spain invested Luis Peralta in the year 1820; which was his when the treaty with Mexico was promulgated in 1848; his when California was admitted into the Union; his at the time of his death; his to dispose of by will; his to create *the claim of title* under the laws of California, in the devisees, which this Court has decreed to be valid?

U. S. vs. Crosby, 7 Cranch, 115.

What has become of the decree of this Court by which these rights were established? What provision of the constitution sanctions its overthrow by the land department?

Irvine vs. Marshall, 20 How. 558, 567, 569.

The constitution, the laws of the United States made in pursuance thereof, and the treaties with Mexico, must be read together, for it is together that they constitute the supreme law of the land; together they recognize the property rights of appellants, and together they control and limit the action of this Court.

2 Story on the Constitution, sec. 1838.

Repudiated by the author of its being, the decree of 1859 comes in confident reliance upon the justice of its claim, to its foster parent for recognition and execution.

The *italics* made use of in this brief are the conception of counsel, and do not occur in the originals quoted from.

Counsel for appellants suggest to the Court the death, on

June 26, 1901, of appellant, Mary E. H. Gwin. Interest in the relief sought on the motion in the Court below and on the appeal to this Court has survived to her co-appellant, Miers F. Truett.

We respectfully ask that the order of the Court below be reversed, and that the District Court be directed to enter an order in pursuance of the mandate of this Court ordered at December Term, 1856, for the execution by the United States, its officers, agents, attorneys, and servants, of its decree of confirmation of November 30, 1859, by the issuance of a patent conformably thereto, for the whole of the confirned claim.

BOYD & FIFIELD,
JAMES T. BOYD,
GEORGE A. KING,
THAYER & RANKIN,
Of Counsel for Appellants.

Exhibit "C."

PATENT.

THE UNITED STATES OF AMERICA,
To
DOMINGO and VICENTE PERALTA.

Feby. 10th, 1877.

The United States of America, to All to Whom These Presents Shall Come, Greeting:

Whereas, it appears from a duly authenticated transcript filed in the general land office of the United States, that pursuant to the provisions of the act of Congress approved the third day of March, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," Domingo and Vicente Peralta as claimants filed their petition on the 21st day of January, 1852, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition they claimed the confirmation of their title to a tract of land situate in the county of Contra Costa and state aforesaid, said claim being founded on a Spanish grant to Luis Peralta made on the 3d day of August, A. D. 1820, by Don Pablo Vicente de Sola, then Military Governor of New California.

And whereas, the board of Land Commissioners aforesaid on the 7th day of February, 1854, rendered a decree of confirmation in favor of said Domingo and Vicente Peralta, which decree or decision having been taken by appeal to the District Court of the United States for the Northern District of California, the said District Court in the cause entitled Domingo and Vicente Peralta vs. The United States, rendered its decree as follows, to wit:

"This cause coming on to be heard on this day upon the petition, and answer, the certified transcript of the proceedings and decision of the Board of Commissioners on private land claims in California and of the papers and evidence on which the same are founded, and upon the further evidence taken by the order of this Court and was argued by counsel—

"In consideration whereof, the Court doth adjudge, order, and decree that the claim presented in the petition filed in this case for the place called San Antonio is valid to the whole extent of its bounds, to wit: Having for its northern boundary a line commencing on the bay of San Francisco, at a point where there are close to the said bay the two cerritos, as described in the first possession given by Martinez to Luis Peralta on the 16th day of August, 1820, running from the said bay eastwardly along

by the southern base of the cerito of San Antonio, up a ravine, at the head of which there is a large rock or monument looking to the north, described in evidence as the Sugar Loaf Rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the Sierra; thence for the western boundary a line running along the comb of the said Sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco at the mouth of the deep creek of San Leandro, and running eastwardly up the said creek to its head or source in the Sierra and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio, and by the said bay of San Francisco from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of the said tract, which line along the bay constitutes its western boundary.

"And it is hereby further adjudged, ordered, and decreed that there be confirmed to the said Domingo and Vicente Peralta the northern portion of said land of San Antonio bounded as follows.

"On the north by the northern boundary of said tract of San Antonio as above described, on the east by the comb of the said Sierra; on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio."

"And thereafter the mandate of the Supreme Court of the United States dismissing the appeal granted and taken in the above entitled cause having been presented and filed in the aforesaid District Court the said District Court, on the 19th day of January, 1858, ordered "that the said claimants, Vicente Peralta and Domingo Peralta, may proceed under the decree of this Court heretofore rendered in favor of said claimants as a final confirmation of the lands claimed in their petition."

And whereas, it further appears that this cause, upon the application of the United States Attorney, was again brought before the aforesaid District Court and the following proceedings had, to wit:

"Stated Term, Nov. 30th, 1859.

"It satisfactorily appearing to the Court that in the decree of this Court heretofore entered in this cause and affirmed on appeal by the Supreme Court of the United States a clerical

error has intervened, and that the said decree is repugnant and inconsistent with itself, and it further appearing to this Court that the northern boundary of the tract of land confirmed to said claimants is erroneously described as running by the *southern* base of the cerrito therein mentioned, whereas the said northern boundary as declared and adopted by the Supreme Court of the United States in the opinion of said Court in this case is the rivulet which issues from the mountain range, and runs along the foot of said cerrito of San Antonio, and at the entrance of a little gulch there is a rock elevating itself in the form of a monument and looking towards the north, and it appearing to this Court that the rivulet so adopted as the said northern boundary runs along the northern base of the said cerritos of San Antonio and not along the southern base thereof, and it further appearing that the ridge of mountains constituting the eastern boundary of said rancho is erroneously denominated its western boundary, as is manifest from the face and terms of the decree itself.

"It is on motion of the counsel for the parties interested in said claim, and the District Attorney being present and not objecting thereto—

"Ordered, that the said decree be, and the same hereby is, construed and amended by substituting the word 'northern' for 'southern' where the word 'southern' first time occurs in said decree and the word 'eastern' for 'western' where the latter word first occurs in said decree.'

"And whereas, it further appears that pursuant to an order of the aforesaid District Court made March 5, 1860, directing the United States surveyor general for the State of California to return into said court a duly certified copy of the plat of the official survey made by him of the land finally confirmed in this case, and in accordance with the subsequent proceedings had in said District Court upon survey and location said District Court on the 4th day of August, 1871, rendered its final decree upon survey as follows, to wit:

"In the Matter of the Survey and Location of that Portion of the Rancho San Antonio, Confirmed in the Above-entitled Cause.

"This cause came on this day again to be heard and, it appearing to the Court that no exception has been filed to the modified survey heretofore made under the order of this Court, and a plat of which was filed in the clerk's office of this Court on the 26th day of July 1871. Now, therefore, on motion of Williams & Thornton, due notice thereof having been given, it

is ordered, adjudged, and decreed, and this Court doth hereby order, adjudge, and decree, that said modified survey be, and is hereby, approved as a true and correct transcript of the lands confirmed in the above-entitled cause.

"The survey of which confirmation is hereby made contains eighteen thousand eight hundred and forty-eight 98-100 (18,848 98-100) acres, and is the same executed under the order and directions of this Court by decree entered in this cause on the 5th day of June, 1871, a duly certified plat whereof was filed in the clerk's office of this Court as aforesaid on the 26th day of July, 1871, and is marked 'Approved August 4th, 1871. Ogden Hoffman, Dist. Judge,' and attached hereto as a part of this decree.

"And whereas, under the thirteenth section of said act of 3d March, A. D. 1851, and the supplemental legislation and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the general land office a return with the descriptive notes and plat of the survey of the said claim confirmed as aforesaid authenticated by the signature of the United States surveyor general for the State of California, which descriptive notes and plat of survey are in the words and figures as follows, to wit:

"U. S. Surveyor General's Office.
San Francisco, Cal. 27th May, 1876.

"Under and by virtue of the provisions of the 13th section of the act of Congress of the third of March, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' and of the 12th section of the act of Congress, approved on the 31st of August, 1852, entitled 'An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes; and whereas the U. S. District Court for the Northern District of California rendered a decision whereby it recognized and confirmed the title and claim of Domingo and Vicente Peralta to the tract of land designated as 'San Antonio,' as appears from the certified copy of the final decree of the said District Court a copy of which is hereto annexed. The said tract of land was surveyed in conformity to the grant thereof and the said decision, and I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as approved by the U. S. District Court, having been examined and approved remain of record therein. The descriptive notes of said tract are in the words and figures following, to wit:

"Beginning at a post in a mound of earth on the marsh on the shore of the bay of San Francisco, opposite the Northern base of the cerrito of San Antonio, on the dividing line between the counties of Alameda and Contra Costa, which names together with 'Initial Point' are marked thereon, and from which the north point of Angel Island bears south seventy-five degrees forty-five minutes west and Victor Castro's house bears north eighty degrees thirty minutes east; thence," etc. (Inserting the field-notes of said survey as shown in the plat thereof).

2100

Exhibit "G."

PATENT.

THE UNITED STATES OF AMERICA,
To
ANTONIO PERALTA.

The United States of America, To All to Whom These Presents Shall Come, Greeting:

Whereas it appears from a duly authenticated transcript filed in the general land office of the United States that pursuant to the provisions of the act of Congress approved the 3d day of March, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," Antonio Peralta, as claimant, filed his petition on the 18th day of June, 1852, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, on which petition he claimed the confirmation of his title to a tract of land containing about two leagues, situate in the then county of Contra Costa and State aforesaid, said claim being founded on a Spanish Grant to Luis Peralta made on the 3d day of August, A. D. 1820, by Don Pablo Vicente de Sola, then Military Governor of New California. And whereas the Board of Land Commissioners aforesaid on the 7th day of February, A. D. 1854, rendered a decree of confirmation in favor of Antonio Peralta as follows, to wit:

In this case on hearing the proofs and allegations it is adjudged by the commission that the claim of the said petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is situated in Alameda County, and is a portion of the land known by the name of San Antonio, and is bounded as follows, to wit: "On the south by a small dry creek known as the boundary between the lands of said Antonio Peralta and his brother, Ygnacio Peralta, being the northern boundary of the land this day confirmed by a decree of this commission to said Ygnacio Peralta, on the north by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, the northern line of this land being the line of division between it and the land of Vicente Peralta; on the west by the bay of San Francisco, and on the east by the mountain range extending nearly parallel to the said bay and being the nearest range thereto. The said premises hereby confirmed are the same, and so intended to be, which are assigned to said Antonio Peralta by a stipulation entered into by the attorneys of said Antonio Peralta and his brothers,

Ygnacio, Vicente, and Domingo Peralta, for an assignment of their respective portions of said place called San Antonio, a copy of which stipulation is hereunto attached and made a part of the decree, the said confirmed premises being subject, however, to the limits above specified.

ALPHEUS FELCH,
THOMPSON CAMPBELL,
R. AUG. THOMPSON,
Commissioners.

In the Matter of Peralta Claim.

It is agreed between the claimants that the southern part of the rancho is the land that was given to Ygnacio Peralta, and extends to a small dry creek bounding the land of Antonio Peralta; that going north, the second part is that of Antonio Peralta, which extends to the lands (of) Vicente Peralta, and a short distance south of the buildings in the town of Oakland, being a ravine on the north of which there is a small house in sight of the public road, the land of Vicente Peralta extends to the land of Domingo Peralta, who owns the northern portion of the rancho and to the most northern limits. These dividing lines extend from the bay to the most eastern boundary of rancho.

(Signed) JONES, THOMPKINS & STRODE,
For ANTONIO & YGNACIO PERALTA.
(Signed) "Irving & Rose."

Which decree or decision having been taken by appeal to the District Court of the United States for the Northern District of California, the following proceedings were had as follows, to wit, in the cause entitled, "The United States, Appellants, vs. Antonio Peralta, Deft."

"In this case, on motion of the defendant by his counsel, and with the consent of the United States District Attorney, it appearing to the satisfaction of the Court that the decree heretofore entered in the case, to wit, on the 4th day of December, 1855, was erroneous and not in conformity to the original decree of this Court entered on the 26th January, 1855, by which the claim to the entire rancho or tract of land known as San Antonio, of which the lands claimed in the present case form a part was declared to be valid and its boundaries distinctly defined and set forth.

It is therefore, adjudged, ordered, and decreed that the aforesaid decree of the 4th day of December, 1855, be, and the same is hereby, annulled and set aside, and that in lieu thereof the following decree be entered in said case nunc pro tunc:

"THE UNITED STATES, Appts.,

vs.

ANTONIO PERALTA, Appellee.

"This cause coming on for hearing at a stated term of said Court on appeal from a decision of the United States Land Commission appointed under an act of Congress approved March 3d, 1851, to ascertain and settle private land titles in the State of California, the same being heard on the record of the proceedings of said commission on petition and answer filed in this court was argued by counsel, and it appearing to the satisfaction of the Court that the land in this case claimed is part and parcel of a larger tract situated in the county of Alameda, and within the jurisdiction of the Court known as the rancho or lands of San Antonio, the title to which said last-mentioned tract of land was by a decree of this Court rendered at a special term thereof on the 26th day of January, 1855, in the case of Domingo and Vicente Peralta vs. The United States, being case No. (100) one hundred on the docket of the same, declared to be valid, and its boundaries ascertained and defined to be as follows, to wit: Having for its northern boundary a line commencing on the bay of San Francisco at a point where there are close to the said bay the two cerritos as described in the first possession given by T. Martinez to Luis Peralta on the 16th day of August, 1820, and running from said bay eastwardly along the southern base of the cerrito of San Antonio up a ravine, at the head of which there is a large rock or monument looking to the north, described in the evidence as the Sugar Loaf Rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the Sierra; thence for the western (eastern) boundary a line running along the comb of the said Sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco at the mouth of the deep creek of San Leandro, and running eastwardly up said creek to its head or source in the Sierra, and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio and by the bay of San Francisco from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of the said tract, which line along

the bay constitutes its western boundary, the northern portion of which said rancho or tract of land called San Antonio, was by the decree aforesaid confirmed to the claimants Domingo and Vicente Peralta, and it appearing further from the evidence in this case, as also by a stipulation between the attorneys of the said Antonio Peralta and his brothers, Ygnacio, Vicente and Domingo Peralta, contained in the records of the case, that the said Antonio Peralta is entitled to a certain portion of the said lands of San Antonio lying north of and adjoining the lands claimed by the said Ygnacio Peralta, the boundaries of which are described and set forth in said stipulation:

"It is hereby adjudged, ordered, and decreed that the claim of the said Antonio Peralta is valid, and that there be confirmed to him the lands described in said stipulation and bounded as follows: On the south by a small dry creek known as the boundary between the lands of the said Antonio Peralta and his brother Ygnacio Peralta; on the north by a ravine a short distance south of the buildings in the town of Oakland; on the north of which ravine there is a small house in sight of the public road, being the division line between the lands hereby confirmed, and the lands confirmed to Vicente and Domingo Peralta by said decree of the 26th of January, 1855, on the west by the bay of San Francisco and on the east by the comb or summit of the Sierra or mountain range nearest to the bay of San Francisco, and running nearly parallel therewith.

"OGDEN HOFFMAN,
"U. S. Dist. Judge.

"I consent to the entry of the foregoing order and decree.

"WM. BLANDING,
"Dist. Atty.

"[Endorsed]: Filed January 29th, 1857. For December 4th, 1855.

"JOHN A. MONROE,
"Clerk.
"By W. H. Chevers,
"Deputy."

And thereafter the Attorney General of the United States having given notice that appeal in the cause entitled "The United States vs. Antonio Peralta" would not be prosecuted by the United States, and a stipulation to that effect having been entered into by the United States District Attorney, the aforesaid District Court on the 20th day of October, A. D. 1857,

ordered, adjudged, and decreed that the order granting appeal in behalf of the United States in this case be vacated, and that claimant have leave to proceed under the decree of this Court heretofore rendered in his favor as under final decree whereby the proceedings of Court upon title became final. And whereas it further appears that this cause was brought before the aforesaid District Court in the matter of survey and location, whereupon the following proceedings were had on the 3d day of February, A. D. 1863, as follows, to wit: "The United States vs. Antonio Peralta, No. 98, Part of San Antonio."

This cause came on to be heard on objections to the official survey and location of the lands confirmed to Antonio Peralta, which survey was made by Jas. T. Stratton, U. S. Dep. Surveyor, and approved October 19, 1858, by J. W. Mandeville, United States surveyor general for California, and a certified copy plat filed herein, and the allegations and proofs having been seen, and counsel for the respective parties heard and due deliberation had in the premises—it is now ordered, adjudged, and decreed that all of said objections be, and the same hereby are, overruled and dismissed, and that the said official survey is a just and true location of the lands heretofore confirmed to the claimant herein, except as to the objections of the intervenors, H. W. Carpentier, H. N. Carpentier, and I. E. Smith, to the including within said survey of the tide lands lying within the corporate limits of the city of Oakland, which said objections are hereby sustained and approved, and so much of said official survey as lies within said corporate limits is hereby adjudged to be erroneous, and ordered to be corrected and modified. And it is further ordered that the United States surveyor general for California cause said survey and location to be corrected and reformed so as to conform to this decree and return the same to this Court for its final confirmation and approval. And it is further ordered and adjudged that in correcting and reforming said survey and location hereunder the said surveyor general shall follow and adopt the official survey already made without change or modification from the initial point thereof designated on said plat "Stake T P 1," through all the lines and courses thereof, respectively numbered on said plat from 1 to 53, both inclusive, and also respectively numbered from 68 to 97, both inclusive, and that between lines or courses 53 to 68 said official survey and location be so changed and modified as to run along the inner line of the shore excluding from said survey and from the lands confirmed the waters of the bay of San Francisco and of the arms

thereof and the lands covered thereby as far as the tides flow at the full and change of the moon. And it is further ordered that a copy of the order be served on the said surveyor general by the United States marshal.

And whereas, it further appears that the following proceedings were had in the said District Court on the 21st day of September, A. D. 1865, as follows, to wit: "The United States vs. Antonio Peralta et al., No. 98." This cause coming on this day again to be heard on motion to vacate the decree entered herein on the 3d day of February, 1863, and on the 2nd day of March, 1863, was argued by counsel, and thereupon and in consideration thereof it appearing to the Court that said decrees so entered as aforesaid do not conform to the decision of this Court and the directions given therefor in its written opinion.

It is ordered, adjudged, and decreed, and the Court doth hereby adjudge and decree, that said decrees be, and the same are hereby, vacated, and it is further ordered, adjudged, and decreed that the survey of that part of the Rancho San Antonio confirmed to the said Antonio Peralta, the field-notes of which were approved by E. F. Beale, United States surveyor general, on the 28th day of February, 1863, be modified so as to exclude therefrom only the lands which are covered by those tides which happen between the full and change of the moon twice in twenty-four hours, and that the said survey be in all other respects approved.

And it is further ordered that the surveyor general of the United States for the State of California cause said survey to be modified as herein directed so soon as practicable, and return into this court a plat of the same for its approval.

And whereas, under the thirteenth section of said act of 3d March, A. D. 1851, and the supplemental legislation and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the general land office a return with the descriptive notes and plat of the survey of the said claim confirmed as aforesaid, authenticated by the signature of the United States surveyor general for the State of California, which descriptive notes and plat of survey are in the words and figures as follows, to wit:

U. S. Surveyor General's Office, San Francisco, Cal.

Under and by virtue of the provisions of the 13th section of the act of Congress of the 3rd of March, 1851, entitled "An act

to ascertain and settle the private land claims in the State of California, and of the 12th section of the act of Congress, approved on the 31st of August, 1852, entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes.

And whereas the U. S. District Court for the Northern District of California rendered a decision, whereby it recognized and confirmed the title and claim of Antonio Maria Peralta to the tract of land designated as San Antonio Rancho in Alameda County, California, as appears from the certified copy of the final decree of the said District Court, a copy of which is hereto annexed.

The said tract of land was surveyed in conformity to the grant thereof and the said decision, and I hereby certify that accompanying map is a true and accurate plat of the said tract of land as appears by the field-notes of the survey thereof, made by Jas. T. Stratton, deputy surveyor, under the direction of this office, which having been examined and approved, remain of record therein.

(Here follows field-notes of this survey).

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Appellees, *v.* VICENTE PERALTA AND OTHERS. MIERS F. TRUETT, Intervenor, Surviving Appellant.	No. 172.

REPLY BRIEF ON THE PART OF APPELLANTS.

Jurisdiction.

This is a direct appeal to this court from an order of the District Court of the United States for the Northern District of California, denying a motion by appellants for the execution of the final decree of confirmation in a California Private Land Case.

The motion was made upon a verified petition or affidavit setting forth at large the proceedings had in the case before the Board of California Land Commissioners, the District Court and this court on appeal, resulting in the decree of which we seek execution.

These proceedings were brought and prosecuted under the provisions of the act of Congress of March 3, 1851, entitled "An Act to ascertain and settle the Private Land Claims in the State of California." (9 Stat. at Large, 631.)

The property affected is the Rancho of San Antonio, now in Alameda County, California. The grant of it was made in 1820, by Sola, the last Spanish governor of Alta California, and was accompanied with juridical possession (livery of seisin). The grant was of a specific tract of land to Don Luis Peralta, by natural boundaries.

Luis Peralta entered into possession under this grant and maintained that possession, open, notorious, adverse and exclusive, until the admission of California into the Union in 1850, and thereafterward until his death. This possession was notice to all the world of the right and title of the grantee. He died possessed of this rancho in the year 1851. He left a will in which he devised this property to his four sons as tenants in common.

The four sons, Antonio, Ignacio, Vicente and Domingo Peralta, presented their joint petition for confirmation on the 21st day of January, 1852, to the Board of Land Commissioners created under the act. It is set forth in the record at page 5.

This petition presented the claims in respect of this grant — was it a genuine grant of the former government and were the petitioners entitled to ask for its confirmation?

The Board confirmed the grant; the District Court confirmed it; and this court, on appeal, confirmed it. This court, in its decree, established the exterior boundary lines of the grant as they are shown by the record in this case — in the survey and plat of 1895. (*United States* v. *Peralta*, 19 How. 343.)

The decree which the District Court entered was made in 1855. The decree of this court was made at its December term, 1856, and handed down early in 1857. The decree of this court established the exterior boundaries of the rancho in accordance with the juridical possession which had been delivered to Luis Peralta. In November,

1859, the District Court acted under the mandate of this court to the extent of conforming its decree of 1855 to the opinion of this court. (Record, p. 8.)

The petition on which this motion was founded asked for execution of this decree. The order of the District Court denying this relief is the order appealed from. This order was a final disposition of the rights of appellants.

It denied them the only relief to which they were entitled under this decree of confirmation, on the ground that this decree had been reversed by the District Court. (*Lewisburg Bank* v. *Sheffey*, 140 U. S. 445.)

The question presented for the consideration of this court on this appeal would seem to be simple and easy of solution.

Has the decree of the District Court entered pursuant to the mandate of this court been executed?

The question may be stated in another way:—

Has the District Court jurisdiction and power to reverse, annul and set aside its decree which had been entered in pursuance of the mandate of this court?

Has it any duty to perform in respect of such decree, other than to execute it?

Presented in this form it seems startling, but it is not novel.

It was presented to this court nearly forty years ago in a California Private Land Case, and was considered and determined by it adversely to this contention, in relation to the Rancho Canada de los Capitancillos.

That case is entitled the *Fossat* or *Quicksilver Mine* case, and is reported in 2 Wallace, at page 649.

The decree, by which the like performance was accomplished in the present case, was entered several years before the decision was filed in the *Fossat* case.

It will thus be seen that consideration of the scope and purpose of the act of Congress of March 3, 1851, is directly

brought in question in considering the power of this court to entertain the present appeal.

The United States had acquired from Mexico by purchase through the Treaty of Guadaloupe Hidalgo a vast extent of territory including what now constitutes the State of California. This treaty imposed upon her certain political and contractual duties and obligations which it was the duty of Congress to perform or provide for their performance.

The act of 1851 was passed to enable Congress to perform these duties and obligations. The scheme involved in it was devised to relieve Congress of the onerous duty of herself performing them. Congress might have acted in their performance directly, but she chose to confer the power upon the instrumentalities provided in the act, in respect of lands in the State of California. The act conferred jurisdiction upon these instrumentalities to do all that Congress could herself have done in performance of these duties and obligations. (*Astiazaran* v. *Santa Rita Mining Co.* 148 U. S. 80, 81.)

The act was plain, simple, symmetrical, complete and admirably adapted to accomplish these purposes and Congress surrendered to these instrumentalities her power over the subject.

She thereby invested them with power to receive the claims of title to real property derived from the former Governments of Spain and Mexico, and to investigate the claims thus presented; with jurisdiction to determine as between the United States and the claimants, whether the grant under which claim was asserted was valid and entitled to recognition under the treaty—and with power to pronounce judgment.

This act was not merely a code of procedure. It was an offer by the United States to the claimants under the former Governments, that if they would submit their

claims of title to the investigation of these tribunals they should receive the like recognition as her own citizens were entitled to, under grants of land from this Government. That if they failed to present their claims within a limited time they should forfeit their property; but presenting them and establishing them should be entitled to a patent from the United States.

Presenting the claim was an acceptance of this offer and established a vested right in the claimant to the relief provided for. (*Hancock* v. *Walsh*, 3 Woods, 351; *Reichart* v. *Felps*, 6 Wall. 165; *United States* v. *Adams*, 6 *Id.* 107.) Appeal to this court was portion of such relief.

But the act of 1851 went further; it not only conferred jurisdiction to pronounce judgment and execute it, but it laid down the rules by which these tribunals should be guided in rendering judgment.

It made the decree of the Board; of the District Court; of this court; whichever became final, conclusive between the claimant and the United States.

The decree thus became the law of the case. It was *res adjudicata* of all the matters litigated between the parties or which might have been litigated in the proceeding.

The decree was made conclusive forever of the rights which it had established, and as they alone had jurisdiction to pronounce it, the power to execute it was only theirs.

No other court and no other tribunal could administer the relief to which the prevailing party was entitled under this Act. The right to that relief in the mode prescribed was a vested right which repeal of the act of 1851 itself could not destroy after petition filed.

That Act stands unrepealed to this day, the foundation of all the acknowledged titles in California derived from Spain or Mexico.

Jurisdiction to pronounce judgment included the power to execute it.

The United States invited the litigation; compelled it, under the severest penalty that she could inflict, viz: forfeiture of the granted lands; and as a litigant she can claim no rights which can not be asserted by an ordinary litigant, and she is equally bound by the results of the litigation.

It is by execution alone that the successful party can reap the fruits of his judgment.

Jurisdiction conferred and acted upon could not be taken away. Nor could Congress, after judgment, hamper execution by the imposition of new and onerous conditions or restrictions.

What was the law for the tribunal when its decree was pronounced is the law for it at this day, when its aid is invoked to award execution.

Considered as a Code of Procedure, the Act of 1851 provided a complete judicial system for the disposition of California Private Land Claims. This system was simple, unique and independent. It was not, nor was any procedure under it, a portion of the Federal Judicial System. The appeal to this court there provided for was not a portion of the appellate jurisdiction of that system. When all the cases provided for in the Act of 1851 shall have had their day in court, and they must have nearly, if not quite all been disposed of, the act will die a natural death. It can not be extingished by legislative action.

Appeal to this court in this class of cases will then have ceased.

The language of the act by which appeal is authorized from the decree of the District Court to this court is mandatory. The District Court is commanded to grant it to the losing party, if he requests it.

If the claimant was unable to give security for costs he should be at liberty to sue out the appeal *in forma pauperis*, that every one, however high or lowly, should have access to this court, to have his rights determined under the treaty.

This court held in the *Fossat* case that a decree of the District court affirming the validity of a grant from the former government without determining the boundaries of the grant was not interlocutory—was an appealable decree. But after this court had passed upon such decree, it should be sent back to the lower court for the purpose of ascertaining the boundaries and for final execution. That when the lower court had acted in this direction a further appeal would then lie to this court to determine whether its action had been had in conformity with the provisions of the act and the decree. That this right existed until the object of the Act had been fully accomplished. (21 How. 450, 451; 23 *Id.* 499.)

Mr. Justice Clifford said in 2 Wall. 726, if the court below adjudged the grant to be valid, it was the duty of that court to ascertain and fix the boundaries as a part of the original adjudication.

This was the form of the decree in the present case; it adjudged the grant to be valid and that the claim attached to the granted lands by the boundaries therein specified.

The character of the scope and purpose of the Act of 1851 was the subject of an instructive and exhaustive commentary in the opinions delivered by Mr. Justice Field and by District Judge Hoffman, in which opinions Circuit Judge Sawyer concurred, in deciding the cases of the United States against Flint and others.

A report of these cases will be found in Vol. 25 Federal cases, No. 15,121.

And to these opinions we earnestly direct the attention

of this court, sustaining as they do our contention in reference to this act.

Considering the question, as an original proposition, independently of the Act of 1851, what is the rule of law which should govern it?

The decree being final, nothing remained to be done but execution. The party in whose favor it went was at once entitled to execution of it; execution of it in pursuance of the law then in force.

This is common learning.

This is the doctrine laid down in the following cases:

Perkins v. *Fournequet*, 14 How. 328–330;
Chicago, etc. v. *Fosdick*, 106 U. S. 83;
City Bank of North v. *Hunter*, 152 *Id.* 515;
Central National Bank v. *Stevens*, 169 *Id.* 432, 464;
The United States Steamboat Co. 178 *Id.* 317, 318;
See also *Ex parte Blake* and others, 175 *Id.* 114.

This court had jurisdiction to cause its judgments or decrees to be executed, whenever its attention should be called by a party in interest to its non-execution by the lower court; we claim that in such a case mandamus is a proper remedy.

We contend that wherever mandamus will lie to compel execution, appeal will also lie from an order of the lower court refusing execution. That is the doctrine of this court as we deduce it from the cases just cited.

Congress may prescribe rules and regulations for the disposition of the public domain.

With respect of the right of the citizen to property its legislation may prescribe the means for its ascertainment and settlement between him and the United States.

When, however, that right is ascertained and determined, it becomes personal to the citizen of the State; antedates the treaty, and brings it within the protecting *ægis* of the Constitution of the United States and of the

State of California. (*United States* v. *Conway*, 175 U. S. 69.) Subsequent Federal legislation can not affect the right thus established. Federal power can not regulate him out of it.

The decree of this court does not create title. It determines that title exists and who is its owner. In like manner the certificate of the land office determines the title to lands acquired from the United States, before patent issues, and patent follows the certificate. This decree is a finality upon the question of title by the boundaries specified.

This is the character of the decree in the case at bar.

Congress could not interfere with the right thus vested in the citizen. The right which had accrued, the right to patent.

It could not thereafter deprive him of his property without due process of law and due compensation.

Section 13 of the Act of 1851 provides how the right thus established should be evidenced.

The Surveyor-General was to survey the confirmed grant, and the General Land Office, upon being presented with a copy of the decree and a plat of the survey, was required to issue a patent for the confirmed claim.

Provision was made in Section 13 for contest of the right to the patent. This contest was limited to parties claiming by derivative title under the original grantee. It had no application to strangers to the title. It had no application to parties to the proceeding. Their rights had been adjudicated. They had had their day in court, and were estopped by the decree.

The contest provided for was not a contest in the Federal Courts. It was a contest in the courts of the State, and the issuance of a patent was to be enjoined by the District Court until the contestants had reasonable time to establish their better right to the patent in those courts.

In the case at bar there was no such contest. No such injunction — no bar to the issuance of a patent to the confirmee.

This survey was made and a copy of the decree was presented in 1896 with the plat of survey to the land office and patent demanded, and as shown by the record, the patent was refused, and no patent has ever been issued to the confirmees.

This brings us directly within the case of *United States* v. *Fossatt* (21 How. 451) and entitles us to come to this court for the relief sought on this motion.

The Acts of 1860, 1864 and 1891 have no application to the case at bar. They were passed long after the decree of 1855 as amended by direction of this court had become final, had become the law of the case. Long after the right of the claimants to have the decree enforced in conformity with the Act of 1851 had become a fixed, vested right.

We shall not attempt to follow the learned counsel for the United States in his able and elaborate brief.

If, as claimed by him and as assumed by the learned judge of the court below, the decree of the District Court of 1855, as amended by decree of this court in 1859, was not a final decree under the act of 1851, we have wholly mistaken the scope and purpose of that act and the decisions of this court.

We call the attention of this court to the views expressed by the learned judge of the District Court in his opinion denying the present motion, and especially to those portions of his opinion which we have quoted at page 38 of our opening brief.

The learned judge is of the opinion that the District Court had power to reverse and set aside its own decree—to reverse and set aside the decree of this court—and to substitute in their place another and different decree, and

that execution of this substituted decree deprived that court of power to execute its original decree.

These propositions must be sustained to support the conclusions reached by that court and which constitute the basis of the arguments advanced on behalf of the United States.

We have the highest respect for the personal character, learning and ability of the Judge of the District Court of Nevada, Judge Hawley.

We claim, however, that he was misled as to the facts of this case, and possibly as to the law, by the opinion of Judge Hoffman on the question of survey in this case, in which he held that the Act of 1860 was a universal panacea for all the ills which afflicted court, counsel and litigant in California Private Land Cases, to the extent of giving the District Court power to reverse itself and to reverse this court and retry the whole case.

Had Judge Hawley in this opinion omitted all that hinged upon the proposition that the Act of 1860 conferred upon the District Court power to reverse, annul and set aside its own decree, even when that decree was entered in pursuance of a mandate of this court, very little would have been left of value to this case in the opinion. The conclusion he reached could only be justified by reversing and setting aside the decree of 1859 and accepting as a final decree the decree which the court below had substituted for that decree.

The learned counsel for the United States suggests at page 14 of his brief that this appeal should be dismissed because the action has relation to the controverted execution of a decree of the District Court under the provisions of the Act of March 3, 1851, and amendatory acts, citing Acts of June 14, 1860, and Act of July 1, 1864. It did not occur to him that these acts were passed after the jurisdiction conferred by the Act of 1851 had been acted

upon and final decrees entered by the District Court and this court.

The District Court erred in holding that the Act of 1860 has any application to the case at bar, for the reasons:

First. That the amendment of 1860 was an attempt by Congress to amend § 13 of the Act of 1851 after the passing of the final decree in this case under that act, within the jurisdiction thereby conferred.

Second. That it imposed new and onerous conditions upon the claimant in addition to those imposed by that act.

Third. That it introduced new issues between new parties and on additional evidence. Opened the door to the whole world to take part in a contest which by the terms of the Act of 1851 was limited to the claimants and the United States, and which that act declared *should not* affect the rights of third persons.

Fourth. That the contest on the title, the title to the land claimed, provided for in the act had already taken place and had become final by the passing of the decree.

Fifth. That the surveys referred to in the amendment were to be surveys of the grant which had been confirmed and as to which § 13 provided the only means by which, and the only purpose for which such surveys could be contested.

Sixth. When the land to be surveyed was not a specific tract but a float, Mexico reserved the right to locate it, and to this right the United States succeeded. Limited to this right, the act of 1860 enabled the United States to determine what land belonged to her and what to the confirmee. She had an interest in the land within which the float was to be located. She anchored the float by survey and passed the title by patent. (*Graham* v. *United States*, 4 Wall. 259; *United States* v. *Pico*, 5 Wall. 536; *Fremont* v. *United States*, 17 How. 565.)

For similar reasons the Act of 1864 is inapplicable to the case at bar.

For similar reasons the Act of 1891 is inapplicable to the case at bar.

And also because that act was limited to a distribution of the "Appellate jurisdiction of the National Judicial System." (*McLish* v. *Roff*, 141 U. S. 661, 666.)

As the appeal provided for in the act of 1851 from the District Court to this court was not portion of the National Judicial System, it was not repealed by the Act of 1891, which only repeals acts inconsistent with the provisions of §§ 5 and 6 of that act.

When a court is acting under a special statutory power, it is governed by the terms of the act, and such act is never repealed by implication.

On the same third day of March, 1891, on which the act was passed creating the Circuit Court of Appeals, an act was passed creating a Court of Private Land Claims, to pass upon titles derived from Spain and Mexico in the Territory outside of California.

This act gives appeal direct to this court from that court in terms nearly identical with the terms of the Act of 1851. This, with the failure to make provision for Private Land Claims in California in the act creating the Circuit Court of Appeals, would indicate that it was the settled policy of Congress that all titles emanating from the former Government should be submitted for final action only to this court. The cases cited in the reply brief show that such appeals are entertained by this court without question.

The treaty of Guadaloupe-Hidalgo still exists as it did in 1848, a living, operative principle, a source of power and sovereignty in the United States over the territory comprised in half a dozen States and Territories of this Union. It has never been abrogated. No right cre-

ated, no territory acquired under it has ever been surrendered. Nor will it ever be abrogated while the stars and stripes still float over this Capitol.

The Act of 1851 by which the rights of the people who then occupied and who now occupy this territory, to be secure in their person and property under the protection of the Constitution, were consecrated, still lives, still consecrates those rights. It has never been repealed, nor can it be, so long as those rights exist and need its protection. The act clings to the treaty as does the ivy to the oak. The national honor is concerned in their continued existence. The faith of this Government was pledged to Mexico and her people and their successors by the treaty, and so also was it pledged by the Act of Congress,which gave life and form and execution to that treaty. The act of 1851, the treaty and the Constitution of the United States became the supreme law of the land. They live and survive together, together they bind every department of this Government—judicial, legislative and executive.

In dealing with the question of the jurisdiction of this court, we have given expression to our contention that the issues presented by the petition to the Board were the validity of the grant, its extent and boundaries and the right of the claimants to confirmation.

That these issues had been fairly met by the United States, had been decided adversely to her, and that the decree of confirmation had become the law of the case and was *res adjudicata* between the United States and claimants and conclusive of their respective rights.

That this was the situation when, on November 30th, 1859, the final decree of confirmation was entered in case No. 100 of the District Court, this case.

This decree has a double aspect. It adjudges the granted lands to be the property of Peralta's Sons. It,

in effect, decides that the United States had no interest in this property, consequently no interest in resisting execution of the decree.

No one claiming under the United States can have any interest in this property, nor can they be interested in resisting this motion. They are equally estopped by the decree. (*United States* v. *Morillo*, 1 Wall. 706.)

If they, or either of them, are successful, they gain nothing. If they lose, they lose nothing.

What is it and how is it that the United States or claimants under her will gain or lose as the result of this contest?

The United States holds the legal title in trust for the grantee of Spain. She can part with it to no one else. She has never parted with it to any one.

We have characterized the subsequent proceedings of the District Court in this case as *coram non judice*.

We asserted that when the validity of the grant and its boundaries were established the jurisdiction of the federal tribunals was exhausted on the question of title to the property adjudicated upon. But the District Court took a different view of the matter. It asserted the right to partition the land of the rancho among the tenants in common and proceeded to award and decree to two of the claimants the northern portion—to Antonio the next portion going south, and to Ignacio the southern portion.

In so doing it was not exercising Federal jurisdiction. It usurped the functions of the State judiciary.

By the same decree of 1859 it assigned to Domingo and Vicente in severalty the northern portion of the rancho.

By another decree in another case, case No. 98, in the District Court it set off to Antonio, in severalty, another portion of the rancho.

And by still another decree in another case, case No. 99,

in said court, it set off to Ignacio, in severalty, another portion of said rancho.

We contend that these decrees were void for want of jurisdiction. What Mexico had done, not what her grantee had done, was a matter of Federal concern. All action had in the District Court subsequently in case No. 100 (this case) was had in relation to the northern portion of the grant. It included surveying a division line between the land assigned to Domingo and Vicente on one hand and Antonio on the other, within the exterior boundary of the lands confirmed.

The partition was based on an alleged stipulation of the parties which made their dividing lines coincident from the Bay shore to the Sierra. And the several decrees followed the stipulation in this respect, and the original surveys, the rejected surveys, followed the decrees.

The District Court, claiming the right to reverse the decrees of this court under the act of 1860, rejected these surveys, reversed the decree of this court, made new decrees, and advised the surveyor to conform his surveys to these new decrees, and when the new surveys came in the court confirmed them, and the patents issued were issued upon these surveys.

The new surveys omitted 2,352 acres of lands confirmed which had been included in the rejected surveys. The patents issued excluded the same 2,352 acres, and it is because of this omission, and because the issued patents do not include all the lands confirmed, is why we are now seeking execution of the final decree of November 30, 1859.

We claim, and it is admitted, by the Land Department that the survey of 1895 is the only survey of this grant which was ever made or filed, and we further contend that we are entitled to patent upon this survey.

It did not occur to the court below in considering this

motion that there is no appeal to Congress from the decrees of this court.

Nor is it true, as assumed by the learned counsel for the United States in his brief, that there has ever been any survey of this grant under this 13th section of the act of 1851 or under the act of 1860, or the act of 1864, except the survey of 1895.

It is this unwarranted assumption by Judge Hawley that led him to hold that the alleged decree of 1871 was the final decree in this case, and the like assumption is manifest in the brief of the learned counsel for the United States.

The decrees of 1871, on which survey was founded, were not surveys of the grant, but of farms within the grant, and were void. A void decree can not be foundation for valid ministerial action under it.

The patents already issued were based upon these void surveys and were also void on their face.

Our further contention is, that where it is made to appear to the court that the Department has failed to patent all the land confirmed it is the duty of this court, and it has power to instruct the Department while the case is *sub judice*, to issue a patent which will embrace the omitted lands.

Errata.

Some errors inadvertently committed in our opening brief we desire now to correct.

The case of *U. S.* v. *Flint* on pages 10, 11, 14, 20, 42, and 53 should have been *Fed. Cas.* 15,121.

The cases of *Halleck*, *Graham and Pico*, cited on page 24, should have been from Wallace instead of Howard.

JAMES T. BOYD,
GEORGE A. KING,
of Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

MARY E. H. GWIN AND MIERS F. TRUETT, appellants, *v.* THE UNITED STATES. | No. 172.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF THE UNITED STATES.

Preliminarily, it is deemed proper to state historically the origin of the present controversy as gathered from this record and the opinion of the Supreme Court in the original case, *United States* v. *Peralta* (19 How., 343).

In 1820 the Mexican Government granted to Luis Peralta the Rancho San Antonio, a tract of land situate in what is now the State of California, and lying between the bay of San Francisco on the west and the Coast Range Mountains on the east.

The title to this grant having passed from Luis Peralta, the original grantee, by devise to his four sons, Domingo, Vicente, Antonio, and Ignacio, they, on January 21, 1852, presented their petition for confirmation of the grant to the board of land commissioners,

provided for in the act of March 3, 1851 (9 Stat. L., 631). Before any action was taken on the claim by the board a stipulation was filed by the claimants by which they divided their said lands among themselves, each taking a part extending from the mountains to the coast, Domingo taking the tract farthest north, Vicente the next on the south, Antonio the next, and Ignacio the other (R., 27).

On Augst 2, 1852, the board of land commissioners made an order that the names of Ignacio and Antonio be stricken from the petition at their request, and that their claim rest on the several petitions, Nos. 273 and 274, which they filed for the confirmation of the parts allotted to them, and that this be done without prejudice, and that the testimony in the original proceedings, so far as practicable, apply to all the said petitions (R., 5, 6).

Nothing appears to show whether or not Ignacio and Antonio ever prosecuted their claims under their separate petitions except the allegation in the present petition (R., 23, 24) "that the United States has issued patents to portions only of said grant as follows: To Antonio Peralta for sixteen thousand and sixty-seven and seventy-six one-hundredths acres; to Ignacio Peralta for nine thousand four hundred and sixteen and sixty-six one-hundredths acres; Domingo and Vicente Peralta for eighteen thousand eight hundred and forty-eight and ninety-eight one-hundredths acres; or, in all, forty-four thousand three hundred and thirty-three and forty one-hundredths acres."

The board of land commissioners, upon the hearing of the case, restricted the area of the grant by fixing the northern boundary line at a certain creek or stream called San Antonio, which included about one-half the claim. Both parties appealed from this decision, and the claim was certified, as provided in the act of 1851, to the United States district court for the northern district of California, and was there docketed as Land Case No. 100.

The district court, upon the trial, reversed the decree of the board of land commissioners, and declared the claim good and valid and entitled to confirmation, and entered its decree on January 26, 1855, in the following terms:

> That the claim presented in the petition filed in this case for the place called San Antonio is valid to the whole extent of its bounds, to wit, having for its northern boundary a line commencing on the bay of San Francisco at a point where there are close to the said bay the two cerritos, as described in the first possession given by Martinez to Louis Peralta on the 16th of August, 1820, running from the said bay eastwardly along by the southern (*northern*) base of the cerritos of San Antonio up a ravine, at the head of which there is a large rock or monument looking to the north, described in evidence as the Sugarloaf Rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the sierra; thence for the western (*eastern*) boundary a line running along the comb of the

said sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco, at the mouth of the deep creek of San Leandro, and running eastwardly up the said creek to its head or source in the sierra and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio, and by the said bay of San Francisco from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of said tract, which line along the bay constitutes its western boundary.

And it is hereby further adjudged, ordered, and decreed that there be confirmed to the said Domingo and Vicente Peralta the northern portion of said land of San Antonio, bounded as follows: On the north by the northern boundary of said tract of San Antonio, as above described; on the east by the comb of the said sierra; on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio (R., 6, 7).

From this decree the United States appealed to the Supreme Court, which court affirmed the decree of the district court. The present petition alleges that this appeal was on the sole question of the validity of the grant (R., 7), but the opinion of the court (*United States*

v. *Peralta*, 19 How., 343) discloses that two principal controversies were passed upon, it being claimed, first, that the officers issuing the grant documents had no power to make grants of lands; and, second, that the northern boundary of the land described did not extend beyond San Antonio Creek; both of which were decided in favor of the claimants.

This decision was handed down March 5, 1857, but nothing is disclosed as to when the mandate was issued and filed in the district court.

The next proceeding appears to have been upon the application of the acting United States attorney on August 30, 1859, when the district court ordered the surveyor-general to bring into court a plat of the survey of the said rancho of San Antonio (R., 11, 12), and in pursuance of this order the surveyor-general on November 2, 1859, returned into court a plat of the survey (R., 14).

On November 23, 1859, the acting United States attorney filed exceptions to this survey, which are set out in the record (p. 15).

Certain manifest clerical errors—the confusion of "southern" for "northern" and "western" for "eastern"—having been noted in the decree of January 26, 1855, were corrected by the court in an amendatory decree of November 30, 1859 (R., 8). This is the decree which the appellants now assert to be the "final" decree in this case within the meaning of the act of Congress of March 3, 1851, after the entry of which the court ceased to possess any further jurisdiction, and that all orders and decrees made and entered

thereafter were *coram non judice*, and that the action of the court upon the survey was totally void.

On December 3, 1859, the district court ordered the survey and plat to be returned to the surveyor-general for correction in conformity with the decree of November 30, 1859, the order stating that since the making of the survey, the original decree had been corrected of certain clerical errors, as was particularly shown in the order for that purpose entered December 1, 1859 (R., 15).

It appears that this survey referred to was a survey "of the northern part of the rancho of San Antonio finally confirmed to Vicente and Domingo Peralta" (R., 14).

Afterwards, on August 10, 1860, the surveyor-general returned into court a plat of survey purporting to be a corrected plat of the survey of said portion of the Rancho San Antonio as directed, of course, by the order of December 1, 1859 (R., 16).

On October 8, 1860, H. W. Carpentier et al. filed a petition of intervention, in which they claimed adversely so much land lying under the waters of that area of the Bay of San Francisco known as the estuary of San Antonio up to the highest tide lines, through mesne conveyances from the State of California (R., 16), and afterwards filed in court their exceptions and objections to the said survey, and the United States also filed its objections thereto (R., 16–17). The court, on November 22, 1862, sustained Carpentier's objections and exceptions to the survey, overruling those of the United States, and, on August 4, 1871, after various

objections, proceedings, orders, and surveys, which are set out in the record (17–21), finally approved the survey which fixes the lines of said grant "to run along the inner shore, excluding therefrom and from the lands confirmed the waters of the bay of San Francisco, and the arms thereof, and lands covered thereby, as far as the tides ordinarily flow at the full and change of the moon" (R., 17), so as to include all the land down to the ordinary high-water line (R., 18–20), and directed that in determining the line of ordinary high water, the line fixed by the officers of the United States Coast Survey as such be adopted, according to a plat of the same which was filed in the case (R., 20, 21) The record does not contain these various plats and surveys.

It appears that an appeal from this decree was taken by the United States to the circuit court for the ninth judicial district, but on July 31, 1874, the appeal was there dismissed (R., 22), the decree dismissing the same properly certified and entered in the district court (R., 22, 23), which ordered that the claimants have leave to proceed under the decree confirming the survey as under final decree (R., 23). In due time the Commissioner of the General Land Office caused to be prepared and recorded a patent of the United States for the lands included in the approved survey (R., 23).

A statement of the deraignment of the interest of the present petitioners and appellants in the lands in controversy is found in the record (R., pp. 9, 10).

Thirty-seven years after the entry of this "final" decree, and twenty-two years after the dismissal of the appeal in the circuit court, the next step in the matter

was taken. It appears that on September 2, 1896, the petitioner Gwin and one Francisco Sanjurjo, now deceased, presented to the Commissioner of the General Land Office (R., 10) a plat of the survey of the said rancho of San Antonio, made, approved, and certified by the surveyor-general of California on November 25, 1895, under the act of Congress of July 23, 1866 (14 Stats., 218), the eighth section of which said act provided that in the event no survey of the said confirmed grant had been, before the passage of said act, requested by said confirmees, nor had any such survey been requested within ten months after its passage, it was thereby made the duty of the surveyor-general for California, as soon as practicable thereafter, to cause the lines of the public surveys to be extended over such land, and to set off in full satisfaction of the grant the quantity of land confirmed in the said final decree and as nearly as could be done in conformity with such decree (R., 9). The petitioner Gwin also presented to the commission certified copies of the decree of November 30, 1859, and other papers, "with a request that he issue, or cause to be issued, to said claimants, confirmees Vicente Peralta and others, a patent for the lands of the rancho, in accordance with such plat of survey, in due form of law" (R., 10), which the Commissioner declined to do, the reasons for so doing being set forth in a letter of the Assistant Commissioner, which appears in the record (pp. 25–26). A reconsideration of the matter was had, and the request again refused in a letter of the Assistant Commissioner (R., 27–30).

The Secretary of the Interior was appealed to, but he likewise refused to issue the patent for the same reasons stated by the Assistant Commissioner (R., 11).

On July 27, 1899, the petitioner, Mary E. H. Gwin, by leave of court, filed in the district court of the United States for the northern district of California her petition of intervention in the case of *United States* v. *Peralta et al.* (R., 35). This petition substantially recited the proceedings had in reference to this grant before the board of land commissioners in 1852, the district court, the appeal to the Supreme Court, and the proceedings down to and including the "final" decree of November 30, 1859, but no court proceedings after that date were set forth; also the making of the plat by the surveyor-general under act of July 23, 1866, the request to the Commissioner of the General Land Office on September 2, 1896, that a patent be issued, his refusal, and the other proceedings in the Interior Department, as heretofore related (R., 35–37), closing with the following prayer for relief (R., 37–38):

> Wherefore your petitioner prays that the decree of this court so made and entered in this proceeding on the 30th day of November, in the year 1859 (and filed December 1, 1859), may be ordered to be executed; that the United States may, by the order and judgment of this court, be directed and required to cause to be made, signed, and issued to the said claimants, confirmees, in the proceeding its patent in due form of law for the lands of the rancho of San Antonio, or for so much and such parts thereof

> as have not heretofore been patented to them or any of them, by a day to be fixed in such order and judgment, and that in default thereof the United States show cause before this court, at a time and place to be fixed in such order and judgment, why she has not so made, signed, and issued, or caused to be made, signed, and issued, such patent, etc.

The United States demurred to the petition on twelve different grounds (R., 38, 39), which demurrer brought to the attention of the court that other and further proceedings than those recited in the petition, which ended with the decree of November 30, 1859, had been had and were of record in the case, and referred particularly to the decree of October 4, 1871, as the final decree.

On January 29, 1900, Judge Hawley rendered a very comprehensive and thoughtful opinion (R., 35–52), dismissing the petition. Part of this opinion is devoted to a discussion of the effect of the demurrer filed by the United States, in view of the fact that the petition recited none of the proceedings and orders in the case after that of November 30, 1859, and entirely ignored the proceedings had in execution of that decree, the scrutiny, supervision, hearing of objections to, and repeated modification of the survey on the part of the district court, leading up to the decree of August 4, 1871, finally approving the survey, and afterwards the issuance of patent thereon by the proper authorities; the petitioners contending that, because of the demurrer, the court should not consider any facts what-

ever except those mentioned in the petition, the demurrer having admitted its allegations as stated. The United States insisted that this petition, being but a single proceeding or phase of the original suit, in which various proceedings and their consequent results had been had over a long period, the court was bound to take judicial notice of the whole record, its own orders and decrees in the original matter, regardless of whether or not they were set forth in the petition (R., 41, 42).

The court adopted the Government's views, and held that the decree of 1871, and not that of 1859, was the final decree in the case, and upon which alone the matter was in condition for issuance of patent by the Commissioner of the General Land Office, and that the patent having been issued to the confirmees upon the survey approved by the decree of October 4, 1871, the court had no power to order the issuance of another or further patent as prayed by the petitioner on the survey of November 25, 1895, made under the act of July 23, 1866; that the obligations resting upon the United States under the treaty concerning Spanish and Mexican grants are purely political in their nature, and are settled and discharged only in such manner and upon such terms as Congress may deem expedient; and this by the decrees of 1859 and 1871 having been regularly done in the tribunals which Congress had vested with certain of its own political prerogative in the shape of a jurisdiction and procedure thereunder, outlined and defined by the limitations it had prescribed in its various acts relating to the matter,

the entire matter is *res adjudicata*. The court sustained the demurrer and dismissed the petition.

This opinion of Judge Hawley is one of the most thoughtful and learned that I have ever encountered, and any attempt to brief it in this statement would be but a spoliation.

On March 29, 1900, the present appellants filed in the district court, in this cause, a properly served notice that it would move the court for a rule or order commanding the United States to issue or cause to be issued to the said claimants, confirmees, Antonia Peralta, Vicente Peralta, Ignacio Peralta, and Domingo Peralta, or to such of them as may be entitled thereto, a patent for the lands of the Rancho San Antonio, in conformity with the survey (of 1895) now on file in the Department of Interior, in execution of the decree of 1859 (R., 31), or of so much and such portions of the said lands as have not been already patented to them or any of them, etc., and that such motion would be founded on the petition annexed.

This new petition (R., 1–31) substantially recites the record and proceedings in the original land case, No 100, as they have heretofore been stated, up to and including the application to the Commissioner of the General Land Office, requesting the issuance of patent on the survey of 1895 which had been executed and approved by the surveyor-general under the act of July 23, 1866, and also the action of the Interior Department declining to do so.

An elaborate demurrer, specifying fifteen grounds, was filed by the United States (R., 31–34), and on

May 28, 1900, the district court rendered an opinion dismissing the petition, a part of which is as follows (R., 34, 35):

> The petition of Mary E. H. Gwin, as intervenor herein, having been heretofore dismissed without prejudice, a new petition has been filed by her and one Miers F. Truett, asking the court to grant the same relief as was prayed for in the former petition. To this petition a demurrer has been interposed, upon the ground, among others in said demurrer specifically mentioned, "that the petition herein does not state facts sufficient to warrant or authorize the court in granting the relief prayed for."
>
> The present petition is not subject to the objection made at the former hearing to the form of the pleadings, and that portion of the opinion which discusses that question may be said to be now eliminated from the case, because the present petition does set forth the steps that were taken and the orders and decrees that were made and rendered by the district court after the entry of the decree of November 30, 1859 (filed December 1, 1859), and states in detail certain facts concerning the plat of survey of November 25, 1895, made by the surveyor-general, upon which the petitioners rely, and the action of the officers of the General Land Office in regard thereto. It will thus be seen that there are many details in the facts set out in this petition that were not embodied in the former petition; but these additional facts simply present the questions herein involved more clearly and distinctly than before. The

> legal principles are precisely the same as were presented, discussed, and decided by this court in *United States* v. *Peralta*, 99 Fed., 618 (R. 35–52), and the views therein expressed are as applicable to this petition as to the former one. * * * The particular matter raised by the petitioner has long since become *res judicata*.

An order in accordance with this opinion was entered on July 30, 1900 (R., 53), and the matter is now before this court on appeal (R., 53–58).

BRIEF.

I.

JURISDICTION.

It is respectfully suggested that, this court is without jurisdiction of this cause and the appeal should be dismissed, for that, this action relates to the controverted execution of a decree of the district court of the United States for the northern district of California, in confirmation of a private land claim under the provisions of the private land claim act of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California" (9 Stat. L., 631), and acts amendatory thereof and supplemental thereto, to wit:

Section 12 of the appropriation act of August 31, 1852 (10 Stat. L., 99).

An act to amend an act entitled "An act to define and regulate the jurisdiction of the district courts of the United States in California, in regard to the survey

and location of confirmed private land claims," approved June 14, 1860 (12 Stat. L., 33).

"An act to expedite the settlement of titles to lands in the State of California," approved July 1, 1864 (13 Stat. L., 332).

By this latter act the right of appeal in such cases to the Supreme Court of the United States was withdrawn and prohibited thereafter, and the circuit court of the United States for California was vested with exclusive appellate jurisdiction.

The obligations resting upon the United States under the treaty of Guadalupe Hidalgo are purely political in their nature, and they may be performed or discharged by the political branch of the Government itself, or by some tribunal of its designation or creation, and upon such terms and conditions as it may impose. (*Ainsa* v. *New Mexico and Arizona R. R.*, 175 U. S., 76, 79.)

The designated or created tribunal may be clothed with final jurisdiction, or its actions may be subjected to such review by appeal as Congress shall in its wisdom declare. It may authorize appeal direct to the circuit court, the circuit court of appeals, or the Supreme Court of the United States, and may from time to time alter or change the tribunal to which appeals will be permitted, if to any.

This controversy does not involve the construction of the validity of the treaty of Guadalupe Hidalgo. It is within the competency of Congress to control the recognition of the obligations assumed under treaties,

especially those of an executory nature, and this prerogative will not be assumed by the judiciary unless invited by appropriate legislation, and then only in manner and to the extent requested.

The first act of Congress looking to the adjustment of the titles to lands within the territory ceded to the United States by the treaty of Guadalupe Hidalgo (1848) was passed March 3, 1851 (9 Stat. L., 631), entitled "An act to ascertain and settle the private land claims in the State of California," familiarly called the "California act," by which it was provided:

> SEC. 8. That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.
>
> SEC. 9. That in all cases of the rejection or confirmation of any claim by the board of commissioners it shall and may be lawful for the claimant or the district attorney, in behalf

of the United States, to present a petition to the district court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim, and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time prescribed by the judge of the district court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States

shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

Section 10 provides for an appeal from the decree of the district court to the Supreme Court of the United States.

All proceedings for the adjustment and settlement of private land claims in California were required to be initiated before said board, and the proceedings were regulated by said act and the various acts of Congress thereafter passed amendatory thereto and supplemental thereof.

Section 13 of the act of 1851, defining the duties of the surveyor-general, is as follows:

SEC. 13. That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States, and for all claims finally confirmed by the said commissioners, or by the said district or Supreme Court, a patent shall issue to the claimant upon his presenting to the General

Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same: and in the location of the said claims the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third of March, one thousand eight hundred and thirty-one: provided always, that if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same: and provided further, that it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed from suing out a patent for the same until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the Commissioner

> of the General Land Office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

By section 12 of an act of August 31, 1852 (10 Stat. L., 99), the manner of perfecting appeals from the board of land commissioners to the district court was somewhat changed, and made more expeditious, but jurisdictionally the act of 1851 was in no way changed or modified, nor was withdrawn or affected the right of appeal to the Supreme Court of the United States given by the tenth section of the act of 1851.

Subsequently Congress passed another act, entitled "An act to amend an act entitled 'An act to define and regulate the jurisdiction of district courts of the United States in California in regard to the survey and location of confirmed private land claims,'" approved June 14, 1860 (12 Stat. L., 33). Prior to the passage of this act the question had been repeatedly raised that the entry of the original decree of confirmation by the district courts exhausted their jurisdiction over the claim, and that control of the execution of the decree by survey had never been given them. It was, however, held otherwise in the case of *United States* v. *Fossat* (21 How., 446) and the Fossat or Quicksilver Mine case (2 Wall., 649, 712, and 713). But whatever doubts may have existed, they were removed by the passage of the act of 1860.

The jurisdiction to supervise, control, and finally approve surveys was expressly given the district courts of the United States with the right of appeal to the Supreme Court. (*United States* v. *Halleck*, 1 Wall., 439.)

Subsequently, and in furtherance of the policy of expediting the final settlement of land titles in California, and to terminate as expeditiously as possible the litigation in various forms in the courts, and as well to relieve the Supreme Court of appellate jurisdiction upon questions of merely instrumentally locating upon the earth's surface the boundaries of grants defined in original decrees of confirmation, and which as a rule simply followed the act of juridical possession, Congress passed an act entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1, 1864 (13 Stat. L., 332).

Section 1 confers final jurisdiction upon the surveyor-general and the Commissioner of the General Land Office over the execution of decrees of confirmation made in compliance with section 13 of the act of 1851. It was the evident purpose of Congress to withdraw from the courts jurisdiction of the execution of these decrees of confirmation and delegate that duty to the land department of the Government.

This was, however, qualified by the subsequent sections of the act, as follows:

> SEC. 2. *And be it further enacted*, That the provisions of the preceding section shall apply to all surveys and plats by the surveyor-general

of California heretofore made, which have not already been approved by one of the district courts of the United States for California, or by the Commissioner of the General Land Office: *Provided*, That where proceedings for the correction or confirmation of a survey are pending on the passage of this act in one of the said district courts, it shall be lawful for such district court to proceed and complete its examination and determination of the matter, *and its decree thereon shall be subject to appeal to the circuit court of the United States for the district in like manner and with like effect as hereafter provided for appeals in other cases to the circuit court.* And such appeals may be in like manner disposed of by said circuit court.

SEC. 3. *And be it further enacted*, That where a plat and survey have already been approved or corrected by one of the district courts of the United States for California, and an appeal from the decree of approval or correction has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where, from such decree of approval or correction, no appeal has been taken to the Supreme Court no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect to the circuit court of the United States for California, and said circuit court shall proceed to fully determine the matter. The said circuit court shall have power to affirm, or reverse, or modify the action of the district court, or order the case back to the surveyor-general for a new survey.

> When the case is ordered back for a new survey the subsequent survey of the surveyor-general shall be under the supervision of the Commissioner of the General Land Office and not of the district or circuit court of the United States.

By the two sections quoted it is perfectly manifest that, subsequent to the taking effect of this act (1864), the Supreme Court was without appellate jurisdiction, unless the appeal had been taken at that date. Thereafter all appeals, which were permissible at all, were required to go to the circuit court, and so the law remained at least until the passage of the act of March 3, 1891 (26 Stat. L., 826), entitled "An act to establish the circuit court of appeals, and to define and regulate in certain cases the jurisdiction of courts of the United States, and for other purposes."

All appeals from the decrees of the district courts, relative to the settlement of the location and survey of private land claims under the acts of 1851, 1860, and 1864, were allowable, after the passage of this latter act, only to the circuit court.

Whether the act of 1891, establishing the circuit court of appeals, drew the appellate jurisdiction from the circuit court to that tribunal or not, still Congress has never since 1864 revived the right of appeal to the Supreme Court of the United States.

It is respectfully submitted that this appeal was improperly taken to the Supreme Court of the United States, and should, therefore, be dismissed.

II.

JURISDICTION OF THE DISTRICT COURT.

Conceding, *arguendo*, that all proceedings subsequent to the entry of the decree of November 30, 1859 (filed December 1, 1859), were *coram non judice*, and consequently are void, and such seems to be the position assumed by appellants, as disclosed by the petition, it follows that, after the passage of the act of July 1, 1864, the courts were deprived of all jurisdiction over the survey in execution of decrees of confirmation of private land claims, and that jurisdiction was transferred to the land department of the Government; therefore appellants' remedy lies in that department, with which the courts will not interfere, especially when the functions to be exercised by it are in their nature judicial.

Section 1 of that act is as follows:

> SECTION 1. That whenever the surveyor-general of California shall, in compliance with the thirteenth section of an act entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3, 1851, have caused any private land claim to be surveyed and plat to be made thereof he shall give notice that the same has been done by a publication once a week for four consecutive weeks in two newspapers, one published in the city of San Francisco and one published near the land surveyed; and shall retain in his office for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and,

if no objections are made to said survey, he shall approve the same and transmit a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington for his examination and approval; but, if objections are made to said survey within the said ninety days by any party claiming to have an interest in the tract embraced by the survey, or in any part thereof, such objections shall be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney and filed with the surveyor-general, together with such affidavits or other proofs as he may produce in support of the objections. At the expiration of said ninety days the surveyor-general shall transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat and objections and proof filed with him in support of the objections, and also any proof produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said Commissioner, he shall indorse thereon a certificate of his approval. If disproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor-general of California, touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey or plat are made in conformity with his directions, he shall indorse upon the

> survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the Commissioner of the General Land Office, it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable after such approval.

By the eighth section of this act the act of June 14, 1860, and "all provisions of law inconsistent with this act," were expressly repealed.

Therefore, if, as alleged in the petition (R., 23), all the acts, orders, judgments, and decrees done and made subsequent to the entry of the decree of December 1, 1859, in respect of the survey of said grant were *coram non judice* and void, the act of 1864 remitted the entire matter to the land department, and the district court was without jurisdiction of this proceeding, and the appeal should be dismissed, or the judgment dismissing the petition affirmed.

If the petition be treated as an attempt to secure a mandatory order to compel the Commissioner of the General Land Office and the Secretary of the Interior to cause a patent to be prepared and recorded upon the survey made and approved by the surveyor-general of California on November 25, 1895, under the provisions of an act of Congress entitled "An act to quiet land titles in California," approved July 23, 1866 (14 Stats., 218), it is sufficient reply to say that, the act of July 23, 1866, was passed to compel an official survey of confirmed private land claims in which no steps had been taken either by the surveyor-general of California or

the confirmees to the lands confirmed, definitely separated from the public lands, and remove the cloud which extravagant claims under Spanish and Mexican grants had cast upon large areas, retarding their subjection to disposition under the land laws of the United States. Confirmed grants so circumstanced no longer remained under the jurisdiction of the district courts, but were remitted to the land department exclusively. (Sec. 8, act July 23, 1866.)

A mandatory order of the district court directed to the Commissioner of the General Land Office and Secretary of the Interior would be futile, for that no jurisdiction was ever given the district courts of California over the actions of these officials by any of the private land claim acts, nor have they under the judiciary act power to entertain jurisdiction of such an action.

III.

RES ADJUDICATA.

On August 30, 1859, upon application of the United States attorney, the surveyor-general was ordered to return into court the plat of the survey approved by him (R., 12).

On November 2, 1859, the surveyor-general, in obedience to said order, did return into court such approved plat of the survey of the northern portion of said claim, confirmed to Vicente and Domingo Peralta (R., 14).

On November 22, 1859, the United States attorney filed objections to said survey (R., 15).

On November 30, 1859, several clerical errors in the decree entered January 26, 1855, having been called to the attention of the court during the investigation of the survey, which had been returned into court upon the order theretofore made, the court ordered that decree amended, correcting the clerical errors, to wit:

> Ordered that the said decree (be), and the same hereby is, construed and amended by substituting the word "northern" for "southern" where the word southern the first time occurs in said decree, and the word "eastern" for "western" where the latter word first occurs in said decree. (R., 8.)

This order was entered December 1, 1859, and the decree, as corrected, was the decree upon which the survey was made, and is designated as the final decree of November 30, 1859, or of December 1, 1859.

On December 3, 1859, the court made an order that the survey theretofore returned into court be returned to the surveyor-general, in order that he might make the same conform to the decree as corrected by the order just mentioned, reserving to the parties entitled to be heard the right to except to the order of December 1, 1859, and the survey which might be made under it (R., 15).

Afterwards, on August 10, 1860, the surveyor-general returned into court a plat of the survey, purporting to be a correct plat thereof, of the northern portion of the rancho San Antonio, containing 19,143.86 acres (R., 16).

On October 8, 1860, Carpentier and others filed their petition of intervention in the case, under the provisions of the act of June 14, 1860, claiming part of the land included within the survey so returned on August 10, 1860, by title derived from the State of California (R., 16). Among the lands so granted by the State and owned by Carpentier et al. was so much of the land included within the survey as lies under the waters of that arm of the bay of San Francisco known as the estuary of San Antonio, and on the shores of said estuary of San Antonio up to the highest tide line, as situated on the northerly side of the middle line of said estuary, claiming that said lands were never included within the grant confirmed nor the decree of confirmation.

Thereafter, Carpentier et al. and the United States filed objections to the survey (R., 16–17), and on November 22, 1862, the district court made an order in the case modifying said survey and plat, that all the objections to said survey were overruled and the said survey approved and confirmed, except "as to the objections of the intervenors, Carpentier and others, to the including within said survey of the tide lands lying within the corporate limits of the city of Oakland; which said objections are hereby sustained, and so much of said official survey as lies within said corporate limits is hereby adjudged to be erroneous and ordered to be corrected and modified" (R., 17); and it was further ordered that the surveyor-general of the United States for California cause said survey and

location to be corrected and reformed, so as to conform to this decree, and to return the same to the court for its final confirmation and approval. Further directions were given also as to the manner of correcting the survey, and directing that the line should be modified so as to run along to the inner line of the shore, excluding therefrom and from the lands confirmed the waters of the Bay of San Francisco, and the arms thereof, and the lands covered thereby, as far as the tides ordinarily flow at the full and change of the moon. The order was duly served upon the surveyor-general by the United States marshal.

On November 26, 1866, on a motion to amend the order or interlocutory decree of November 22, 1862, so as to conform to the decision of the court directing a decree, it was ordered that the survey be modified between courses 93 and 113 so as to include all the land between said courses down to the ordinary high-water line, and exclude only so much land between said courses as is covered by the tides which happen between the full and change of the moon twice in twenty-four hours. All other exceptions were overruled and the survey in other respects approved, and the surveyor-general was directed to proceed without delay to cause the modifications to be made and return into court a certified plat of the survey, so modified, for its approval. (R., 18.)

Various proceedings were had, for the purpose of correcting the survey, until on August 4, 1871, when the court, after due notice had been given, adjudged

and decreed that the modified survey be approved as the true and correct location of the lands confirmed in said cause, the survey of confirmation containing 18,848.96 acres, and is the same executed under the direction of the court by decree entered in the cause on June 5, 1871 (R., 21).

Thereupon an appeal was sued out by the United States to the circuit court of the United States for the ninth judicial circuit (R., 21), which was, on stipulation, thereafter dismissed on July 31, 1874 (R., 22).

On the presentation of the certificate of dismissal, it was ordered that a copy of the decree be filed in the court, and that the claimants have leave to proceed under the decree therefore entered in the case, confirming the survey, as under final decree; and thereafter patent was issued to Domingo and Vicente Peralta, confirmees, for the northern portion of said grant (R., 23).

The foregoing proceedings, taken subsequent to the mandate of the Supreme Court, were regular and in conformity with the law, under the act of 1851, and the various acts amendatory thereof of 1860 and 1864, and as to Vicente and Domingo Peralta, and their privies, it was a final and complete settlement and determination of all their rights against the United States, especially the location of the shore of the bay, which was the particular question litigated and determined. The petitioner, Mary Gwin, claims title under Vicente Peralta, through mesne conveyances, as early as 1855 (R., 9, 10), and Miers F. Truett acquired his interest

by inheritance from his father, in 1878, who acquired his interest from Vicente Peralta, by mesne conveyances, in November, 1855 (R., 9, 10). The petitioners are therefore in such privity with Vicente Peralta that they are not strangers to the proceedings had and taken in the Supreme Court on appeal, and those subsequently taken in the district court relative to the execution of the decree of confirmation, and are bound by the actions of the court upon the survey and the final issue of patent, which inured to their benefit as the legal representatives, in part at least, of the claimants and confirmees. The jurisdiction of the court ceased upon the issue of patent.

It was perfectly competent for them to have come into the original case for the purpose of controlling the proceedings and protecting their interest: the private land claim acts provided for such intervention. But, aside from such express authority, having acquired an interest through the claimants, it would have been perfectly proper for them to have come in to protect their interests and to aid the other claimants, but in so doing they must accept the case as they find it and act conjointly. Having refrained from intervening for their own protection and permitting the jurisdiction to become exhausted by a final executed decree, and having accepted the benefits thereof for over twenty years without protest or excuse for their laches, all matters determined and which were necessary to be determined are *res adjudicata* as to the confirmees and their privies. The issue raised by the present pleadings is the survey

of the line called for in the decree as the "Bay of San Francisco," and it was determined and adjudged on June 5, 1871, that the line should include all the lands between said courses (93 and 113) down to the ordinary high-water line, and exclude only so much land between said courses as is covered by the tides which happen between the full and change of the moon, twice in twenty-four hours (R., 20); which was accordingly done, and the survey again returned into court and finally approved August 4, 1871 (R., 21). The lands excluded, therefore, by this survey and decree were those lying between high and low tide. This is the very question which the appellants are seeking to have the court redetermine adversely to its former adjudication, so that an additional patent may issue for the lands lying between high and low tide. The district court was jurisdictionally competent to determine this question, and its decree became final. The petitioners are now precluded from reopening the question. This principle was clearly announced by this court in *Southern Pacific R. R. Co.* v. *United States* (168 U. S., 48, 49), wherein the court reviews its adjudications on the subject of *res adjudicata*, and says:

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or

fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

IV.

PLEADINGS.

The final petition upon which the case comes to this court is in the nature of an amended petition presented after the opinion of Judge Hawley, filed January 29, 1900, upon the demurrer of the United States to the petition of Mary E. H. Gwin, rendered July 27, 1899. (R., 35–52.)

The opinion of Judge Hawley upon the demurrer to the amended petition of Gwin and Miers F. Truett (R., 34, 35) relieves the case of any serious difficulty, so far as the propriety of the form of pleadings is concerned.

If the petition be treated as an attempted intervention under the same right, the petitioners must accept

the case as they find it and submit to have the record in Land Case No. 100, *United States* v. *Vicente Peralta et al.*, judicially noticed in determining any question involved. It is immaterial what the pleading be called, the record is within the judicial notice of the court, and not subject to technical rules of pleading; and the demurrer might just as well be designated as suggestions on the record in opposition to entertaining the petitioners' application. Otherwise, the case must stand as an original suit, subjecting it to the jurisdictional objections heretofore considered.

All private land claim acts, and the procedure therein provided, have attempted to avoid technical rules of procedure by which the conclusion of the litigation can be delayed and the results thereof rendered questionable or ineffective.

A complete answer to the technical objections to the form of the pleadings on behalf of the United States is found in the case of *United States* v. *Fossat* (21 How., 446), wherein Mr. Justice Campbell, for the court, said:

> In the exercise of the jurisdiction conferred by this act (1851) and acts of a similar character, this court has habitually revised decrees of the district court which were not final decrees under the judiciary act of 1789. The court has uniformly accepted, in the first instance, as a final decree, one that ascertained the authenticity of the claimant's title, and declared, in general terms, its operation, leaving the questions of boundary and location to be settled subsequently. This practice was approved

in the case last cited (*Ex parte Sibbald* v. *United States*, 12 Pet., 488). The peculiar nature of these cases rendered such a relaxation of the rules of proceeding of the court appropriate. The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation.

They had instrumentalities adequate to the fulfillment of their engagements without delay whenever their existence was duly ascertained. There was no occasion for the strict rules of proceeding that experience has suggested to secure a speedy and exact administration between suitors of a different character; and it has rarely occurred that the same case has reappeared in the court after the first decree. If the litigation had been other than it was, the rule of proceeding would have varied with it.

The petition and demurrer spread before the court the entire record relative to the controversy. In this character of cases, and "in an investigation of this kind that court is not limited to the dry, technical rules of a court of law." (*Ely's Administrators* v. *United States*, 171 U. S., 220, 240.)

The act of Congress of March 3, 1891, establishing and defining the jurisdiction and procedure of the Court of Private Land Claims, is much more restrictive in all respects than any of the former private land-claim acts; yet neither that court nor the Supreme Court has ever permitted matters of form of procedure

to interfere with the liberal, effective, and just ascertainment and settlement of the rights of claimants to lands, and their speedy recognition and separation from the public domain by survey and patent.

The various acts of Congress referred to, of 1851, 1852, 1860, 1864, and 1866, develop a clear intent to bring the litigation to a termination and quiet the titles to lands in California. In the spirit of these acts the demurrer of the United States was the proper response to the so-called petition of intervention filed by Mary E. H. Gwin and Miers F. Truett on March 29, 1900.

Indeed, a general demurrer would have been sufficient to reach every question attempted to be raised by the special grounds assigned, and, as well, the great laches, for which no excuse is offered in the petition. The general rule, which has peculiar application to the allegations contained in the petition, is stated in 1 Bates on Federal Equity Procedure (par. 196, p. 260), as follows:

> If it appears upon the face of the bill that the plaintiff is chargeable with laches in the assertion of his rights, the defect may be taken advantage of by demurrer. Laches is a defense which may be made by demurrer or by plea, or by answer, or presented by argument, either upon a preliminary or final hearing, or the court may, upon its own motion, refuse to consider plaintiff's case, where it appears that he is chargeable with laches.

If it be contended that the execution of the decree of 1859, by the approval of the survey in 1871, was

only an execution *pro tanto*, to that extent, at least, is it *res adjudicata* as to these petitioners. As to the remaining portion of the grant, and the surveys thereof, if they have not been executed in accordance with law, relief must be sought in the land department of the Government. But it is anticipated from the allegations in the petition (R., 23, 24) that patents have been issued for the total area of the grant, and that the real purpose and intent of this proceeding is to obtain from the district court and this court a recognition of some unadjudicated and undetermined right belonging to these petitioners or the original confirmers, Domingo, Vincenti, Antonio, and Ignacio Peralta, to the land along the entire frontage of the grant on the bay of San Francisco between high and low tide. A sufficient answer to this is to say that, so far as the court has adjudicated the west line of this grant along the bay of San Francisco, it was fixed at the ordinary high-water line, as located by the officers of the United States Coast Survey, and, as repeatedly suggested herein, if anything remains to be done, the petitioners must be remitted to the land department of the Government.

Respectfully submitted.

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No. 172.

Add'l Br. of Attorney General
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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

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ADDITIONAL BRIEF FOR THE UNITED STATES.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

ADDITIONAL BRIEF FOR THE UNITED STATES.

The remarkable liberty taken by counsel for appellants with the meager record in this case calls for some notice and reply on behalf of the United States, lest too much be deemed conceded.

The brief of appellants was not in the possession of counsel for the Government until after their original brief had been filed.

The real contention is stated as follows:

> Appellants are not complaining that a patent for the confirmed claim has been made to the wrong person. Their cause of complaint is that no patent for such claim has been made to any one. (Appellants' brief, p. 52.)

If this be true, then under the acts of Congress of July 1, 1864 (13 Stat., 332), and July 23, 1866 (14

Stat., 218), the district court for the northern district of California had no jurisdiction to grant the relief prayed.

It is perfectly manifest that the difficulty confronting appellants does not arise from the want of survey and patent under the original decree of confirmation entered December 1, 1859, but from the neglect on the part of the confirmees and their grantees to appeal from the decree of final approval of the survey in 1871, upon which the patent to Domingo and Vicente Peralta was issued in 1877. They had their day in court and failed to pursue the remedy by appeal, as provided by law they might if dissatisfied, and now, twenty-five years after, Gwin and Truett, claiming under Vicente Peralta, insist that all proceedings under the decree of 1859 were *coram non judice*, and consequently are void.

But is it correct to say that the decree has not been executed and, although holding under Vincente Peralta, appellants are in nowise bound by the actions of the court since 1859? Is the contention true that the mandate of the Supreme Court, issued upon the opinion of this court in case of *United States* v. *Vincente Peralta et al.* (19 How., 343), has not been obeyed?

Counsel evidently confuses the two jurisdictions of the district court, viz:

First. To determine the validity of the claim and the external boundaries of the grant, or the quantity to be thereafter located if afloat, and the interest of claimant therein.

Second. To supervise surveys made by the surveyor-general in execution of original decrees of confirmation, which had been entered by the district court on appeal from the board of commissioners, or which were brought before the court, under the provisions of the act of June 14, 1860, upon application of any party affected by such survey.

It was held in the *Fossat* or *Quicksilver Mine* case (2 Wall., 649–712) that the jurisdiction of the district court over surveys in execution of decrees entered by it could be exercised as an inherent power in the court to compel a correct execution of its decrees. But grave doubts were repeatedly suggested as to the propriety and legality of such control, and more especially the jurisdiction of the district court over surveys made in execution of decrees of the board of commissioners where no appeal had been prosecuted and no decree had been entered by that court upon which to predicate jurisdiction.

All doubts were, however, removed by the passage of the act of June 14, 1860 (12 Stat., 33). *United States* v. *Fossat* (21 How., 446), and *United States* v. *Halleck*, (1 Wall., 439–454).

The jurisdiction of the district court to supervise surveys made under decrees of the court or the board of commissioners, where no appeal has been prosecuted to the district court, was expressly conferred for the first time by the act of 1860, and was a jurisdiction distinct from that authorizing the original decree or confirmation.

In the case of *Higueras* v. *United States* (5 Wall., 827–833), it was held:

> Jurisdiction over the "right or title" of the claimant is conferred upon the commissioners, under the act entitled "An act to ascertain and settle private land claims," but the jurisdiction over the surveys of the same, after the plat is certified and approved by the surveyor-general, is conferred upon the district court under the subsequent act, and the two things are wholly distinct and can not be blended, nor can the one be substituted for the other.

No jurisdiction over surveys was ever conferred upon the board of commissioners.

The decree of the district court determined the validity of the entire grant and the external boundaries which was affirmed on appeal, as was also that part of the decree which specifically confirmed to Vicente and Domingo Peralta the northern portion of the grant, with the boundaries of such portion designated by natural objects in the decree (*United States* v. *Peralta*, 19 How., 343). So that the entry of the decree of December 1, 1859, was in complete obedience to the mandate; if not, an appeal should have been prosecuted within the time and manner provided by the act of 1851, upon the ground that the mandate had been disobeyed or misinterpreted. No appeal having been prosecuted from the decree entered in obedience to the mandate on December 1, 1859, or from the decree in 1871 approving the survey, neither are now open to question by the confirmees or their grantees.

That these appellants are grantees under one of the confirmees, Vicente Peralta, is disclosed by an allegation in the petition (R. 9) that—

> Your petitioners further show that they are interested in the lands of the said ranchoe under the *claimants and confirmees*, and that their respective title thereto was derived by mesne conveyances from the said confirmees.

Domingo, Vicente, Antonio, and Ignacio Peralta, the sons and devisees of Luis Peralta, the original grantee of the rancho San Antonio, on January 21, 1852, presented their joint petition under the act of 1851 to the board of commissioners for a confirmation of the claim, and the same was docketed by the board as case No. 4 (R., 5).

On August 2, 1852, the board made the following order (R., 5 and 6), viz:

> On motion of the counsel of Ignacio Peralta and Antonio Peralta, ordered that their names be stricken out from the petition No. 4 and their several claims rest on the several petitions, Nos. 273 and 274 on the docket of this board, for portions of the rancho San Antonio, and that this be done without prejudice, and that the testimony heretofore taken in No. 4 shall, so far as applicable, apply to all the said petitions.

Thereafter the claim was prosecuted before the board, district court, and the Supreme Court in the names of Vicente and Domingo Peralta for their interests in the grant.

The agreement or stipulation for partition of the grant between the four claimants, and under which

Antonio and Ignacio Peralta withdrew "without prejudice" from the joint petition No. 4 before the board of commissioners and under which they severally prosecuted their claims before said board as Nos. 273 and 274, does not appear in this record.

But it sufficiently appears in the proceedings that there was assigned to Domingo and Vicente Peralta the northern portion of the claim, and the boundaries thereof are set out in the decree of the district court entered on January 26, 1855 (R., 6 and 7), which was affirmed by the Supreme Court at the December term, 1856, and became, upon the mandate, the decree of December 1, 1859.

Attached to the brief on behalf of the appellants, as Exhibit G, is a copy of a portion of the patent issued to Antonio Peralta for his portion of the grant lying to the south of that portion assigned to Domingo and Vicente, but how counsel imports this into the record we are unable to say; but taking it at face value, it is evident the claim against the United States, so far as Antonio Peralta is concerned, has been fully satisfied and neither he nor those claiming under him have ever complained or protested that the patent so received was not a complete and full satisfaction of his claim under the Luis Peralta grant. That portion assigned to Ignacio Peralta, being the southern portion of the grant, was confirmed to him, surveyed and patented, and no complaint is forthcoming from him or those claiming under him that he has not received full satisfaction of his claim under the Luis Peralta grant.

The court found the grant to be valid and entitled to recognition to its full extent, and decreed confirmation specifically to Domingo and Vicente of their portion, which was affirmed by the Supreme Court.

It would probably have been the better practice to decline Antonio and Ignacio permission to withdraw from the original case No. 4, with leave to proceed upon their separate petition in cases Nos. 273 and 274 for their respective interests or tracts, as the board of commissioners had in the single case all claimants for the grant before it, and could have settled all rights in one suit But there is nothing in the statute discovered by the writer prohibiting such course if the parties in interest so agreed and the court consented. Their withdrawal could not affect the right of Domingo and Vicente to proceed with the case, establish the validity of the grant, and have their interest confirmed to them.

The interests asserted by appellants are not undivided in the entire grant, but undivided interests in that portion only which was allotted to Vicente and described in the petition (R., 9–10) as—

> All that portion of the said rancho lying south of a line running from a ravine or gully in the range of mountains of the Contra Costa south 63 degrees, west magnetic, to the shore of the bay of San Francisco, said line following the same direction to the center of Yerba Buena Island or Goat Island, and being the dividing line between the lands of Domingo Peralta and said Vicente Peralta; on the northeast by the

> said ridge of mountains of Contra Costa to a gulch or ravine called de la Audita; on the southeast by said ravine to the estuary of San Antonio; on the south and southwest the bay of San Francisco.

which was conveyed on August 2, 1853, by Vicente Peralta and wife to Richard P. Hammond, John C. Hays, John Caperton, and Lucien Herman. On November 10, 1855, Richard P. Hammond conveyed to Mary E. H. Gwin "twenty-five undivided one thousand and one parts of the same tract of land." On November 3, 1855, said Hammond conveyed to Henry B. Truett, ancestor of appellant Miers F. Truett, "(twenty-five thousand) 25,000 (two hundred thousand and two hundred) 200,200 parts of the same tract of land."

It thus appears appellants neither owned nor claimed an interest in the entire grant, but only in that portion before described, being the same allotted to Vicente Peralta. Nothing appears to show that appellants or their counsel represent the interests of Domingo, Antonio, or Ignacio Peralta to the remotest degree in the whole or any portion of the grant, and so far as shown they and those claiming under them are and have ever been satisfied with, and have accepted, the benefits of the confirmations and patents.

It was not violative of the statute for the court to declare the external boundaries of the grant and limit the confirmation to the interest shown by the claimants before the court. It was probably the better practice where the claimants before the board or the

court were owners of only a portion of the grant for the court to determine the validity and external boundaries of the same, or the total quantity if afloat, and then confirm only so much as the claimants might have shown themselves entitled, leaving the unrepresented interests to be asserted by the claimants thereof in their own way or have the bar of the statute interposed.

This practice was substantially adopted in the *Cañada de los Capitancellos* grant, which was under review by the Supreme Court three separate times, to wit, in the case of *United States* v. *Fossat* (20 How., 413), (21 How., 446), and the *Fossat* or *Quicksilver Mining* case (2 Wall., 649).

That case was brought originally before the board of commissioners under the act of March 3, 1851, by appellee upon a "claim for three-fourths of a league of land known as a part of the Cañada de los Capitancellos." The original grant was to Justo Larios for a parcel of land having that name, and who sold it in 1845 to a person "from whom the appellee deduced title to an undivided three-fourths interest, and that his share had been set apart to him by a valid conveyance." The Supreme Court held the grant to Larios to be for 1 league of land, and, concluding, said:

> The grant to Larios is for 1 league of land to be taken within the southern, western, and eastern boundaries designated therein and which is to be located, at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land

> claims in California by the Executive Department of this Government. The external boundaries designated in the grant may be declared by the district court from the evidence on file, and such other evidence as may be produced before it, and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee. (20 How., 413–461.)

If the interest of Fossat in the league had been set apart by partition agreement as the northern three-fourths, what objection would there have been to describing it by particular boundaries and confirming it accordingly, if the court was sufficiently advised thereof?

Such was the course adopted in the case at bar, which violated neither the letter nor the spirit of the act.

The proceedings against which objection by appellants are directed constitute the survey of the northern portion of the grant confirmed to Domingo and Vicente Peralta, for they show no interest in any other.

This survey, after repeated correction under the orders of the district court, was finally approved on August 4, 1871, and upon which the patent to Domingo and Vicente Peralta was issued and accepted to the northern portion of the grant.

The real contention to which brief of appellants goes is that the western boundary of the grant designated as the Bay of San Francisco should have been surveyed to low-tide water line and where an estuary broke the continuity of the line, such as the estuary

called Bay of San Antonio, the line should have been run across its mouth from headland to headland.

The question which the district court *did* adjudicate by the decree approving the survey of 1871 was that the location of the western boundary should be at mean high-water mark on the Bay of San Francisco, and *specially* that the line should be run on the shore line at mean high-water mark in the estuary of the Bay of San Francisco called the Bay of San Antonio. In other words, that the western boundary should be surveyed at high-water mark, as fixed by the Coast Survey, following necessarily the meanderings of this line, thus excluding the estuary called the Bay of San Antonio, situate on the southern side of the city of Oakland.

Without entering into an investigation or discussion of the question as to whether a decree fixing the boundary at a bay or the sea properly carried the line to ordinary high-water mark or to low-water line, or whether the common or civil law rule should prevail, it is sufficient answer in this proceeding to say that the conclusive presumption of the conformity of the approved survey and patent issued thereon, to the decree of confirmation, follows from the decree of the district court approving it, no appeal having been prosecuted to correct errors if any were committed. So long as the patent stands uncanceled, it is full execution and satisfaction of the claim, binds the United States and those claiming under them, and binds the confirmees and those claiming under them.

The present so-called intervenors, Gwin and Truett, are not within the term "third persons," as used in the fifteenth section of the act of 1851.

In *Beard* v. *Federy* (3 Wall., 478), which was quoted approvingly in *Domingues de Guyer* v. *Banning* (167 U. S., 723–741), it was held that:

> The term "third person," as then used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the Government in disposing of the property.

It was further held by Mr. Justice Field in *Moore* v. *Wilkinson* (13 California, 488), and quoted approvingly in the case of *Domingues de Guyer* v. *Banning* (supra, 743–744), that:

> The fifteenth section of the act of Congress of 1851 provides that the final decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. If conclusive between the United States and the claimants, it must be equally so between persons holding under either of those parties.

The survey conforms to decree of confirmation, and has been adjudicated in the proper proceeding which binds these appellants.

In the case of *Miller* v. *Dale* (92 U. S., 473), which was a contest between a claim under a decree of confirmation and approved survey made in execution

thereof and a patent under a decree of confirmation, where the surveys overlapped and conflicted.

In discussing the act of June 14, 1860, Mr. Justice Field for the court said:

> Originally surveys were left entirely to the action of the local surveyor and the Land Department. Great complaints were sometimes made that surveys thus established were unjustly extended in directions so as to include the settlements and improvements of others; and contests over them were in consequence often prolonged for years. To prevent possible abuses in this way, the act of Congress of June 14, 1860, was passed, allowing surveys, when objection was made to their correctness, to be brought before the court and subjected to examination, and requiring them to be corrected if found to vary from the specific directions of the decrees upon which they were founded; or if the decrees contained no specific direc-directions, from the general rules governing such cases. *The approval of the court established the fact that the survey was in conformity with the decree of confirmation;* or if the decree was for quantity only, that the survey was authorized by it; and in either case the approval rendered the survey conclusive as to the location of the land against all floating grants not previously located. The questions then left for controversy before the courts related to the title of the property, the parties proceeding upon the established conformity of their respective surveys with the decrees upon which they were founded.

In the case of *Adam* v. *Norris* (103 U. S., 591), Mr. Justice Miller, referring to the case of *Miller* v. *Dale* (*supra*) and the history of the act of June 14, 1860, says:

> The last of the cases above cited gives the history of the act of June 14, 1860, and holds that the effect of a compliance with the act is limited to the establishment of the conformity of the survey to the decree of confirmation, which fact could not afterwards be disputed by anyone who, under that act, had opportunity to contest it before the district court.

Referring again to the opinion of this court by Mr. Justice Field in the case of *United States* v. *Halleck* (1 Wall., 439), which recognized the application of the act of June 14, 1860, to surveys which had been returned into the district court for its examination in execution of the original decree of confirmation made by the board of land commissioners on April, 1857, said:

> In May following a survey of the tract confirmed was made under the directions of the surveyor-general of California and was approved and transmitted by him to the Commissioner of the General Land Office at Washington for examination and approval preliminary to the issue of a patent. In May, 1858, the Commissioner appears to have approved the survey and to have made preparations to carry the same into a patent, but was overruled by the Secretary of the Interior, who in September following disapproved of the survey and sent the case

back to the surveyor-general. At the subsequent December term of this court, the decision of the case of the *United States* v. *Fossat*, 21 How., 445 (62 U. S., 16, 186), was made, which was supposed by the district court of California to recognize a jurisdiction in that court to supervise all surveys of confirmed claims under Mexican grants. Acting upon this view of the decision, the district court, in November, 1859, ordered the new survey which had been made by the surveyor-general to be returned into the court and gave leave to the claimants to file exceptions to it. The new survey was, accordingly, returned and *exceptions to it were filed by the claimants and purchasers under them;* and proceedings upon the exceptions were pending on the passage of the act of June 14, 1860. Whatever question might be raised as to the jurisdiction of the court to supervise the surveys previous to that act, there can be none since its passage. *The act applies not merely to surveys subsequently made, but also to such surveys as had been previously made and approved by the surveyor-general and returned into the district court upon objections to their correctness.*

The latest case which considers the conclusive effect, upon confirmees and their grantees, of approved surveys and patents issued thereon is that of *Dominguez de Guyer* v. *Banning*. (167 U. S., 732.)

This was an action of ejectment for the possession of Morman Island, situate in the inner Bay of San Pedro, California, claimed by the plaintiff to be within the exterior lines of the bay, and within the exterior lines

of the confirmed tract as described in the decree of confirmation, although excluded by the approved survey and patent issued in conformity thereto. Mr. Justice Harlan, delivering the opinion of the court, said:

> The plaintiffs therefore contend that we have a case in which the survey made in execution of the decree of confirmation under the act of 1851, and the patent based on that survey, except and exclude lands which, although within the exterior lines of the bay, are within the exterior lines of the confirmed tract as described in such decree.
>
> But does it follow that in this action to recover possession plaintiffs can recover lands that were excluded from the survey and are not embraced by the patent based upon that survey? The plaintiffs offered in evidence in support of their title a patent which manifestly did not grant lands that were excluded from the surveyed claim; and yet it is contended that they may go behind both the survey and patent and recover the possession of the lands so excluded, precisely as they could do if the lands had been included in both the survey and patent.
>
> In our opinion, if those who obtained the decree of confirmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the district court before the survey was transmitted to the General Land Office, or at least before it was acted upon and made the basis of a patent. The patent was not issued until nearly a year after the survey was made and certified. Under the act of 1851 it was within

> the power of the district court to have required a survey in exact conformity with its decree. Its jurisdiction over the subject did not end with the decree. The surveyor-general was required by the statute (13) to cause an accurate survey to be made of all private claims finally confirmed under the act of 1851, and to furnish plats of the same. If he misinterpreted the decree, if he made an inaccurate survey, and excluded from it lands that were confirmed to the original claimants, the court had authority to compel the proper execution of its decree (736).

If the district court erred in the attempt to make the surveyed lines conform to the decree of confirmation, the action was subject to review upon appeal to the Supreme Court prior to the passage of the act of July 1, 1864 (13 Stat., 332), and thereafter by appeal to the circuit court of the United States for the district.

This course was not taken by confirmees nor those claiming under them, and they are bound by the patent as a complete and full judicial determination that the approved survey conforms to the decree of confirmation, and all questions adjudicated antecedent to the patent are concluded while the patent stands uncanceled, and as to confirmees and those claiming under them are *res adjudicata*.

It is contended that neither the confirmees nor their grantees ever presented "to the General Land Office an authentic certificate of such confirmation and plat or survey of the said land, duly certified and approved

by the surveyor-general of California," and requested a patent, and hence the authority to issue a patent never vested.

This provision is not jurisdictional, but remedial, furnishing ground for action compulsory in character against the officer in case he does not proceed to carry into effect the decree of the court, after survey has been finally approved, by causing patent to issue to the confirmee.

However, in this instance the survey was approved and patent was issued and accepted by confirmees and their grantees, and enjoyed for over twenty years without protest. The observation of Mr. Justice Harlan in *Dominguez de Guyer* v. *Banning*, *supra* (739), is conclusive of this contention:

> So far from the claimants under the decree of confirmation rendered in 1857 bringing the survey before the district court in order that any error therein might be corrected, they accepted it as filed. We say this because the statute requires a patent to issue to the claimant upon *his* presenting to the General Land Office an authentic certificate of the confirmation *and a plat or survey of said land, duly certified and approved by the surveyor-general of California.* If the claimants under the decree of confirmation did not themselves present the survey to the General Land Office and ask a patent in accordance therewith, they accepted a patent based upon that survey, and plainly showing that it conformed to a survey that did not embrace, for the purpose of a patent, anything within the

exterior lines of the inner Bay of San Pedro. If the Secretary of the Interior, upon inspecting the survey and the decree of confirmation, had authority to order a new survey or to disregard the part of it excluding lands within the exterior lines of the inner bay, the record does not show that any effort was made in the Land Office to bring about such result. On the other hand, if the Land Office had only a ministerial duty to issue a patent in exact accordance with the decree of confirmation, no steps were taken to compel the performance of that duty. We have, therefore, a case brought in 1886 in which the plaintiffs seek to recover the possession of lands alleged to have been confirmed in 1857 to those under whom they claim, but which lands in 1858, nearly thirty years before the commencement of this action, were expressly excluded as well from the survey, to which no objection was urged, as from the patent issued to and accepted by the claimants under that decree. We are of the opinion that while it may be true in some cases that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, *yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claimants*, and, until canceled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree. Such is the effect of former decisions of this court.

It is insisted on behalf of the Government that the appellants, Gwin and Truett, by their neglect and

silence, have foreclosed themselves of all right to contest the lack of conformity of the patent to the decree of confirmation, in this or any other form of proceeding.

The decision of Assistant Commissioner Mondell, holding that the "action of the courts upon the surveys of these claims precludes this office from further action" was sound, and the attempt to cloud the title of the entire water front of the city of Oakland, on the Bay of San Antonio, by obtaining a patent upon a survey made in 1895 under the act of July 23, 1866 (14 Stat., 218), was providently arrested, and serious and embarrassing litigation prevented.

It is respectfully submitted that Gwin and Truett have no such standing as will enable them to challenge the conclusive conformity of the patent to the decree of confirmation, which inured to their benefit as the successors in interest, in part, to the land confirmed to Domingo and Vicente Peralta.

JOHN K. RICHARDS,

Solicitor-General.

MATTHEW G. REYNOLDS,

Special Assistant to the Attorney-General.

FEBRUARY 20, 1902.

Supreme Court of the United States.

No. 172.—October Term, 1901.

Mary E. H. Gwin et al., Appellants, *vs.* The United States. } On appeal from the District Court of the United States for the Northern District of California.

[March 24, 1902.]

This is an appeal from an order of the District Court of the United States for the Northern District of California sustaining a demurrer to, and dismissing the petition of, the appellants, intervenors, who prayed that a certain decree of the above-named District Court, made on November 30, 1859, be ordered to be executed.

It appears that on January 31, 1852, certain persons by the name of Peralta presented to and filed with the board of land commissioners, under the act of Congress "to ascertain and settle the private land claims in the State of California," passed March 13, 1851, (9 Stat. 631,) a petition for the confirmation of the rancho of San Antonio. Subsequently the four claimants divided the lands among themselves in severalty, and the board, proceeding to examine the claim upon the evidence, decided in favor of its validity, but restricted the area of the grant by fixing the northern boundary line at San Antonio Creek, which included about one-half of the claim. Both parties appealed from this decision, and the claim was certified to the District Court for the Northern District of California, in which court a transcript of the proceeding was filed September 23, 1854. The District Court upon the trial reversed the decree of the land commissioners, and declared the claim as set forth in the petition to be valid, by decree entered January 26, 1855.

From this decree the United States appealed to this court, which affirmed the decree of the District Court, (1857.) (*United States* v. *Peralta*, 19 How. 343.) Two controversies were decided: first, that the officers issuing the grant had power to make grants of land; and, second, that the northern boundary of the land extended beyond San Antonio Creek, according to the claim of the petitioners. Upon the mandate of this court being filed in the District Court a final decree was entered therein on November 30, 1859, slightly amending its former decree in substantial compliance with such mandate. This decree is still in force.

Afterwards, and on August 10, 1860, the surveyor general returned into court a corrected plat of a survey, purporting to be in conformity with the decree of November 30, 1859. Thereupon, and on October 8, 1860, one Carpentier and others filed a petition of intervention, in which they

claimed adversely so much land as lay under the waters of the estuary of San Antonio, up to the highest tide lands, through mesne conveyances from the State of California, and afterwards filed in court their exceptions to the survey. The United States also filed exceptions thereto. The litigation thus inaugurated continued for more than ten years, and finally resulted in a decree of the District Court, August 4, 1871, approving a modified survey of the tract, a certified plat of which had been filed in the clerk's office. An appeal was taken from this decree by the United States to the Circuit Court for the Ninth Judicial Circuit, by which court the appeal was dismissed July 31, 1874, and a decree entered that the claimants have leave to proceed under the decree confirming the survey as a final decree. The Commissioner of the General Land Office thereupon caused to be prepared and recorded a patent of the United States for that portion of the lands included in the survey.

Thirty-seven years after the entry of the decree of November 30, 1859, and twenty-two years after the dismissal of the above appeal in the Circuit Court, the successors in title of one of the Peraltas presented to the Commissioner of the General Land Office, September 2, 1896, a plat of a survey of the rancho San Antonio made by the surveyor general of California, November 25, 1895, under the act of Congress of July 23, 1866, (14 Stat. 218,) with certified copies of the decree of November 30, 1859, with a request that he issue to the petitioners a patent in accordance with such plat of survey, which the Commissioner declined to do, September 22, 1896, and the Secretary of the Interior affirmed his decision. The appellants thereupon and on July 27, 1899, filed in the District Court for the Northern District of California a petition of intervention in the original case of the *United States* v. *Peralta*, praying that the decree of November 30, 1859, might be ordered to be executed: that the government be required to issue to the appellants its patent for so much of the lands of the rancho as had not theretofore been patented to them, or any of them. The United States demurred to the petition, which, on January 29, 1900, was dismissed.

This was followed by another similar petition, filed March 29, 1900, based upon the survey of 1895, which was also demurred to, and resulted in a decree, rendered May 28, 1900, sustaining the demurrer and dismissing the petition. Whereupon petitioners appealed to this court.

Mr. Justice Brown delivered the opinion of the Court.

The appeal in this case is taken from the decree of May 28, 1900, sustaining the demurrer to, and dismissing the petition of, the appellants, which was filed March 29, 1900.

Our jurisdiction of this appeal depends upon certain statutes, which it becomes necessary to consider. By the original act of March 3, 1851,

(9 Stat. 631,) to ascertain and settle the private land claims in the State of California, a commission of three persons was constituted (sec. 1) to settle such claims, whose duty it was (sec. 8) to decide upon their validity and to certify the same, with their reasons, to the district attorney of the United States. By sec. 9, an appeal was given to the District Court, which was empowered to review the decision of the commissioners, and to decide upon the validity of such claim. By sec. 10, the District Court was required, on application of the party against whom judgment was rendered, to grant an appeal to the Supreme Court of the United States. It was held in *United States* v. *Fossatt*, (21 How. 445,) that the jurisdiction of the board of commissioners extended not only to the adjudication of questions relating to the genuineness and authenticity of the grant, but also to all questions relating to its location and boundaries; and that it did not terminate until the issue of a patent conformable to the decree.

The law remained in this condition until 1864, when on July 1 an act was passed, (13 Stat. 322,) "to expedite the settlement of titles to lands in the State of California," the second section which provided "that where proceedings for the correction or confirmation of a survey are pending . . . it shall be lawful for such District Court to proceed and complete its examination and determination of the matter, and its decree thereon shall be subject to appeal to the Circuit Court of the United States for the district, in like manner, and with like effect, as hereafter provided for in appeals in other cases to the Circuit Court." By section three it was enacted "that where a plat and survey have already been approved or corrected by one of the the District Courts, . . . and an appeal from the decree of approval or correction, has already been taken to the Supreme Court of the United States, the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where from such decree of approval or correction no appeal has been taken to the Supreme Court, no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect, to the Circuit Court of the United States for California, and said Circuit Court shall proceed to fully determine the matter."

It appears perfectly clear from section three that the appellate jurisdiction of the Supreme Court was taken away, except as to cases where an appeal had already been taken. With this exception appeals must be taken under that act to the Circuit Court. The law remained in that condition until the passage of the Court of Appeals Act of March 3, 1891, (26 Stat. 826,) by the fifth section of which appeals can only be taken directly from the District Court to this court in cases where the jurisdiction of the District Court is in issue, in prize cases, criminal cases, constitutional cases, or cases involving the validity or construction of a treaty. As to all other cases, by section six, appeal must be taken to the Circuit

Court of Appeals. As we said in *McLish* v. *Roff*, (141 U. S. 661,) this act provides for the distribution of the *entire* appellate jurisdiction of our national judicial system between the Supreme Court and the Circuit Court of Appeals. As this case does not fall within any of the classes excepted by section five, it is clear that if any appeal will lie at all, it should have been taken to the Circuit Court of Appeals, and that we have no jurisdiction to enforce the execution of this decree by appeal from the District Court. If the decree of November 30, 1859, rendered by the District Court in pursuance of the mandate of this court, were not a final decree, it became final either August 4, 1871, when the modified survey was approved, and an appeal was taken to the Circuit Court and the appeal dismissed by Mr. Justice Field, July 31, 1874, or upon May 28, 1900, from which the appeal was taken in this case.

It is clear that, so far as concerns appeals from final decrees, they must be taken under laws then in existence, and to the court provided by such laws. To say that a decree rendered in 1900 may be appealed to a court, whose jurisdiction to review it was taken away in 1864, is beyond belief. Even if the Court of Appeals Act do not apply to this case, the jurisdiction of this court was clearly taken away by the act of 1864, and transferred to the Circuit Court of the United States for California, except as to appeals which had already been taken. If there had been no reservation of pending cases, even such cases would have fallen within the law. (*Railroad Co.* v. *Grant*, 98 U. S. 389, 401.) In that case a writ of error had been sued out on December 6, 1875, to reverse a judgment of $2,250 by the Supreme Court of the District of Columbia. At that time the appeal was properly taken to this court, but on February 25, 1879, Congress passed an act limiting writs of error from this court to judgments exceeding the value of $2,500, and it was held that the writ of error must be dismissed. Said the Chief Justice: "The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their cases to this court by writ of error and appeal, and gave us the authority to re-examine, reverse or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ of error already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in

dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit because our jurisdiction is gone."

Similar cases are by no means infrequent in this court. Thus in *Yeaton* v. *United States*, (5 Cranch, 281,) it was held that if the law, under which a sentence of forfeiture was inflicted, expired or were absolutely repealed after an appeal and before sentence by the appellate court, the sentence must be reversed. See also *The Schooner Rachel*, (6 Cranch, 329;) *United States* v. *Preston*, (3 Pet. 57;) *Norris* v. *Crocker*, (13 How. 429.) In *Insurance Co.* v. *Ritchie*, (5 Wall. 541,) it was held that the jurisdiction of the Circuit Courts between citizens of the same State in internal revenue cases, conferred by the act of 1864, was taken away by the act of 1866, and that cases pending at the passage of the act fell with its repeal. (*Ex parte McCardle*, 7 Wall. 506.) These cases fully establish the proposition that a repealing statute which contains no saving clause operates as well upon pending cases as upon those thereafter commenced.

In the case under consideration there was a saving of suits already begun, but there was an express proviso that, where no appeal had been taken to the Supreme Court, no appeal to that court should be allowed. That law remained unchanged until the Court of Appeals Act of 1891, to which all appeals from Circuit or District Court must now be taken, with a few specified exceptions.

The appeal must be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.